112-250

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 304.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNION TRUST COMPANY OF NEW YORK, TRUSTEE FOR THE CHILDREN OF WILLIAM ORTON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 24, 1881.

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1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Union Trust Company of New York, trustee for the children of William Orton, deceased, plaintiff, and Connecticut Mutual Life Insurance Company, defendant, a manifest error hath happened to the great damage of the said Connecticut Mutual Life Insurance Company, as is said and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the supreme court of the United States, at the capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, chief justice of the supreme court of the United States, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and fifth.

JOSEPH M. DEUEL,
*Clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit.*

Allowed April 21st, 1881.

SAM'L BLATCHFORD,
*Circuit Judge.*

2 (Endorsed:) U. S. supreme court; Connecticut Mutual Life Insurance Company, plaintiff in error, *against* Union Trust Company of New York, trustee for the children of William Orton, deceased, defendant in error; writ of error; W. A. Beach, att'y for plaintiff in error, 120 Broadway, N. Y.; due and timely service of the within writ of error is hereby admitted; dated New York, April 22, 1881; Union Trust co. of N. Y., trustee, &c., by Miller & Peckham, att'ys.

UNITED STATES OF AMERICA, } *ss.*
*Southern district of New York,* }

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, by virtue of the foregoing writ of error, and in obedi-
3 ence thereto, do hereby certify that the following pages, numbered from four to one hundred and seventy-seven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Connecticut Mutual Life Insurance Company, plaintiff in error, *against* Union Trust Company of New York, trustee for the children of William Orton, deceased, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 At a special term of the supreme court of the state of New York, held in and for the city and county of New York, at chambers thereof at the county court-house in the city of New York and county aforesaid, on the 29th day of November, A. D. 1878—

Present: The Hon. Abraham R. Lawrence, justice.

Union Trust Company of New York, trustee for the children of William Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

On reading and filing the petition of the Connecticut Mutual Life Insurance company, the defendant in this action, praying for the removal of this suit into the circuit court of the United States in and for the southern district of New York in the second circuit, verified on the 19th day of November, 1878, the bond offered with said petition, duly executed and acknowledged on the day last afore-
5 said, by Philip S. Miller and James J. Goodwin, both of the city, county, and state of New York, as required by the acts of congress of the United States providing for the removal of suits from state courts into the circuit court of the United States, the order of Mr. Justice Abr'm R. Lawrence, dated said 19th day of November, 1878, requiring the plaintiff or its attorneys to show cause why the prayer of said petition should not be granted, with admission of service of all said papers on plaintiff's attorneys, and the summons and complaint in this action, and the written appearance of the defendant now presented and filed in open court, and the motion under said order to show cause having now come regularly on to be heard:

Now, after hearing Beach & Brown, esq's, of counsel for the defendant, in support of the motion, and no one appearing in opposition thereto, it is—

Ordered that the prayer of said petition be and it hereby is granted, the security offered by the defendant is hereby accepted and said

bond in all things approved, and the above-entitled suit is
6 hereby removed into the circuit court of the United States in and for the southern district of New York in the second circuit.

And it is further ordered that no further proceedings be had in said suit in this court.

7 N. Y. supreme court.

Union Trust Company of N. Y., trustee, etc.,
*vs.*
Connecticut Mutual Life Insurance Co.

STATE OF NEW YORK,
County of Renselaer:

Edwin A. King being duly sworn, says he is over 21 years of age; that at the city of Troy, in said county, on the 23rd day of October, 1878, he served the annexed summons, together with the complaint therein mentioned, which is also hereunto annexed, on Eleazer A. Peck, the designated agent and attorney of the said defendant, who resides in said city, by delivering a copy of the same to him personally and leaving the same with him. Deponent further says that he knew the person served as aforesaid to be such attorney for the defendant.

EDWIN A. KING.

Subscribed and sworn to before me this 23rd day of October, 1878.

HARVEY J. KING,
*Commissioner of Deeds, Troy, N. Y.*

8 *Summons.*

Supreme court, county of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased, plaintiff,
*against*
Connecticut Mutual Life Insurance Company, defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 21st, 1878.

MILLER & PECKHAM,
*Plaintiff's Attorneys.*

Office and post-office address, No. 29 Wall street, N. Y. city. P. O. box 3472.

Supreme court, county of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased, plaintiff,
*against*
Connecticut Mutual Life Insurance Company, defendant.

The complaint of plaintiff respectfully shows to this court:

That plaintiff is a corporation duly organized under the statutes of the state of New York.

That defendant is a corporation duly organized under the laws of the state of Connecticut as a life insurance company, and authorized to do business in the state of New York.

That on or about the twenty-first day of February, 1878, the defendant, for a valuable consideration, duly executed and delivered to this plaintiff its (the said defendant's) certain policy of insurance on the life of William Orton, wherein and whereby said de-
10 fendant, for a valuable consideration therein expressed, insured the life of said William Orton, then being alive, for the term of his, said William Orton's, natural life in the sum of five thousand dollars, which said sum of five thousand dollars said defendant therein and thereby promised to pay to this plaintiff in trust for the surviving children of the said William Orton, share and share alike, within ninety days after due notice and satisfactory evidence of the death of said William Orton during the continuance of said policy.

That on or about the 22nd day of April, 1878, in the city of New York, the said William Orton departed this life; that due notice and satisfactory evidence of the death of the said William Orton were given and produced to the said defendant, and that more than ninety days have elapsed since the giving of said notice and the production of said evidence to the defendant.

That since the lapse of said period plaintiff has duly demanded of the defendant the payment of the said sum of five thousand dollars; that defendant refused to pay the same, or any part thereof.

11 That plaintiff and the said William Orton, deceased, have, and each of them has, duly performed all and singular the conditions and covenants in said policy and agreement on the part of them or either of them to be done and performed.

Wherefore plaintiff demands judgment against defendant for five thousand dollars, and interest from September 16th, 1878, and costs of this action.

MILLER & PECKHAM,
*Plaintiff's Attorneys*,
No. 29 Wall st., N. Y.

CITY AND COUNTY OF NEW YORK, *ss.*:

Edward King, of said city, being duly sworn, says that he is president of plaintiff; that the foregoing complaint is true to his knowl-

edge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDW'D KING.

Sworn to before me October 21st, 1878.

DAN'L SEYMOUR,
*Notary Public, N. Y. co.*

12 Supreme court of the state of New York, city and county of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

On the petition of the defendant, verified by Philip S. Miller, general agent of said defendant, on the 19th day of November, 1878, and the bond offered therewith, all of which are hereto annexed, and upon the summons and complaint in this action and the appearance of said defendant to be entered on the motion hereunder, let the plaintiff or its attorneys show cause before this court, at a special term thereof to be held in and for said city and county of New York, at chambers, at the county court-house therein, on the 29th day of November, 1878, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why this suit should
13 not, by an order of this court, be removed into the next circuit court of the United States to be held in and for the southern district of New York in the second circuit, and no further proceedings had in said suit in this court, and the security offered by the said defendant approved and accepted, and such other and further relief or order granted to the defendant in the premises as shall be just.

And in the meantime, and until the hearing and determination of the motion hereunder and the entry and service of an order thereon, not exceeding twenty days, all proceedings on the part of the plaintiff in this action are hereby stayed.

ABR'M R. LAWRENCE,
*J. S. C.*

14 Supreme court of the state of New York, city and county of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

To the honorable the supreme court of the state of New York:

The petition of the Connecticut Mutual Life Insurance company of Hartford, Connecticut, respectfully shows:

That your petitioner is the defendant in this suit, and that the said suit was brought by the Union Trust company of New York, trustee for the children of William Orton, deceased, the plaintiff therein, on the 23d day of October, 1878, in the supreme court of the state of New York in and for the city and county of New York, by
15 service of the summons and a copy of the complaint therein upon one of the agents of your petitioner appointed to accept process in this state, and that said plaintiff is and at the time of bringing this suit was, as your petitioner is informed and believes, a citizen of the state of New York, and that your petitioner is and at the time of bringing this suit was a citizen of the state of Connecticut; and your petitioner further respectfully shows that there is and was at the time of commencement of this suit a controversy therein between a citizen of the state of New York, to wit, the said Union Trust company of New York, trustee for the children of William Orton, deceased, the plaintiff in this suit, and a citizen of the state of Connecticut, to wit, your petitioner, the defendant therein; and further, that the plaintiff claims in and by the summons and complaint in this suit as damages against your petitioner the sum of five thousand dollars, with interest thereon from the 16th day of September, 1878, besides costs, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs,
16 to wit, the whole amount so claimed by plaintiff as aforesaid.

And your petitioner further respectfully represents that no final hearing or trial of said suit has been had, and that said suit is now pending for trial in this honorable court, and that your petitioner has not as yet entered its appearance therein, and that the only proceedings that have been heretofore had or papers served have been the service of said summons and copy complaint and an extension of the time for the defendant to appear and answer therein given.

That your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States to be held in and for the southern district of New York, in the second circuit, in pursuance of law as contained in the statutes of the United States providing for the removal of causes in certain cases from state courts into the circuit court of the United States.

Your petitioner further says that it offers herewith a bond executed by Philip S. Miller and James J. Goodwin, as sureties, in the penal
17 sum of five hundred dollars, conditioned that your petitioner shall enter in the next circuit court of the United States to be held in and for the southern district of New York in the second circuit, on the first day of its session next ensuing after the filing in this court of the said bond and its petition, copies of all process served upon it in this court and a copy of the record in said suit, and shall enter or cause to be entered its appearance in said circuit court, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall do such other appropriate acts as are re-

quired by the said statutes in that case made and provided, as good and sufficient surety according to the said provisions of law upon the removal of a suit from a state court into the circuit court of the United States.

And your petitioner further shows that the summons and copy complaint in said suit was served on your petitioner on the 23d day of October, 1878, and the time for your petitioner, the defend-
18 ant, to appear and answer the said complaint will expire on the 29th day of November, instant, and your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in and for the southern district of New York in the second circuit, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had therein in this court. That all proceedings herein on the part of the plaintiff may in the meantime and until the hearing and decision of the motion hereon, and the entry and service of an order thereon, be stayed, and that an order be now made requiring plaintiff or its attorneys to show cause why the prayer of this petition should not be granted.

And your petitioner will ever pray, etc.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
By PHILIP S. MILLER,
*Gen'l Agent.*
BEACH & BROWN,
*Att'ys for petitioner on this application,*
No. 120 Broadway, N. Y.

19 STATE OF NEW YORK, }
*City & county of New York,* } *ss.*

Philip S. Miller, being duly sworn, says that he is general agent in the city of New York of the Connecticut Mutual Life Insurance company, the petitioner in the foregoing petition: that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

PHILIP S. MILLER.

Sworn to before me this 19th day of Nov., 1878.
GEO. W. MARK.
*Notary Public N. Y. Co.*

20 At a special term of the supreme court of the state of New York, held in and for the city and county of New York, at chambers, at the county court-house in said city, on the 29th day of November, A. D. 1878—

Present: The Hon. Abram R. Lawrence, justice.

Union Trust Company of New York, trustee for the children of Wm. Orton, deceased,
*ag'st*
Connecticut Mutual Life Insurance Company.

The Connecticut Mutual Life Insurance company, the defendant in the above-entitled action, hereby appears therein by Beach & Brown, its attorneys, and presents to this court its petition for a removal of this suit into the circuit court of the United States in and for the southern district of New York, together with the order
21 to show cause accompanying the said petition, and offers a bond in conformity with the acts of congress of the United States in such case made and provided.

BEACH & BROWN,
*Att'ys for def't,*
No. 120 Broadway, N. Y.

(Endorsed:) Motion granted, A. R. L.; filed Nov. 30, 1878. Service of the within order to show cause & of a copy of within petition is hereby admitted. N. Y., Nov. 29, 1878. Miller & Peckham, p'ff's att'ys.

22 Supreme court, city and county of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

We, Philip S. Miller, of No. 9 East 48th street, in the city of New York, and James J. Goodwin, No. 59 West 34th street, in the said city of New York, are held and firmly bound unto the Union Trust company of New York, trustee for the children of William Orton, deceased, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Union Trust company of New York, trustee for the children of William Orton, deceased, its successors or assigns, for which payment, well and truly to be made, we do bind ourselves, our and each of our heirs, executors, & administrators, jointly and severally, by these presents. Sealed with our seals and dated the 19th day of November, 1878.

23 Whereas a suit was brought on or about the 23rd day of October, 1878, in the supreme court of the state of New York, by the said Union Trust company of New York, trustee for the children of William Orton, deceased, against the Connecticut Mutual Life Insurance company of Hartford, Connecticut, and the cause is now pending in the supreme court of the state of New York in & for the city and county of New York, and is removable into the circuit court of the United States in and for the southern district of New York, in the second circuit, under the acts of congress for the removal of a suit from a state court into the circuit court of the United States;

And whereas the said Connecticut Mutual Life Insurance com-

pany is about to present and file its petition in said supreme court of the state of New York in & for the city and county of New York, for the removal of said suit into the next circuit court of the United States to be held in & for the southern district of New York:

Now, therefore, the condition of the above obligation is such, that if the above-named company, or its legal representatives,
24 shall enter or cause to be entered in the circuit court of the United States for the southern district of New York, on the first day of its session next ensuing after the filing in said supreme court of the said petition and this bond, duly approved, copies of all process served upon it in said supreme court, a copy of the record of said suit, shall enter or cause to be entered its appearance in said circuit court, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do or cause to be done all such other appropriate acts as by the said acts of congress are required to be done upon the removal of a suit from a state court into the United States circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

PHILIP S. MILLER. [SEAL.]
JAMES J. GOODWIN. [SEAL.]

In presence of—
GEO. W. MARK.

25 STATE OF NEW YORK, }
*City & county of New York,* } *ss.*

Philip S. Miller, one of the sureties in the foregoing obligation named, being duly sworn, deposes & says that he is a resident of the state of New York and a freeholder therein, and is worth the sum of one thousand dollars over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

PHILIP S. MILLER.

Sworn to before me this 19th day of November, 1878.

GEO. W. MARK,
*Notary Public, N. Y. Co.*

STATE OF NEW YORK, }
*City & county of New York,* } *ss.*

James J. Goodwin, one of the sureties in the foregoing obligation named, being duly sworn, deposes and says that he is a resident of the state of New York and a freeholder therein, and is worth the sum of one thousand dollars over all the debts and liabilities
26 which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

JAMES J. GOODWIN.

Sworn to before me this 19th day of November, 1878.

GEO. W. MARK,
*Notary Public, N. Y. Co.*

STATE OF NEW YORK,
*City & county of New York,* } *ss.*

On this 19th day of November, 1878, before me personally appeared Philip S. Miller and James J. Goodwin, to me known, and known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein mentioned.

GEO. W. MARK,
*Notary Public, N. Y. Co.*

(Endorsed:) Approved; Abr'm R. Lawrence, J. S. C.; service of a copy of the within bond is hereby admitted; New York, Nov. 20, 1878; Miller & Peckham, pl'ff's att'ys; filed Nov. 30, 1878.

27 STATE OF NEW YORK,
*City and county of New York,* } *ss.*

I, Hubert O. Thompson, clerk of the said city and county, and clerk of the supreme court of said state for said county, do certify that I have compared the preceding with the original summons, complaint, and record of the suit of "Union Trust company of New York, trustee for the children of William Orton, deceased, against Connecticut Mutual Life Insurance company," on file in my office, and that the same is a correct transcript therefrom and of the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal this fifth day of April, 1879.

[SEAL.] HUBERT O. THOMPSON, *Clerk.*

28 (Endorsed:) U. S. circuit court southern district of New York; Union Trust company of New York, trustee, &c., ag'st Connecticut Mutual Life Insurance company; certified copy; order of supreme court of the state of New York removing above-entitled suit from that court into this court, of all process served on defendant in that court and of record of said suit in that court; Beach & Brown, attorneys for defendant, 120 Broadway, N. Y.; U. S. circuit court; filed April 7, 1879; John I. Davenport, clerk.

29 Circuit court of the United States for the southern district of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

SIR: The Connecticut Mutual Life Insurance company, the defendant in the above-entitled action, hereby appears therein by the undersigned, its attorneys in said action, and you will please enter its appearance accordingly.

Yours, &c.,

BEACH & BROWN,
*Att'ys for Def't, No. 120 Broadway, N. Y.*

To JOHN I. DAVENPORT, esq., *Clerk, &c.*

(Endorsed:) Circuit court of the United States for the
30 southern district of New York; Union Trust company of New York, trustee for the children of William Orton, deceased, *against* Connecticut Mutual Life Insurance company; appearance of defendant; Beach & Brown, att'ys for def't, No. 120 Broadway, N. Y.; U. S. circuit court; filed April 7, 1879; John I. Davenport, clerk.

31 Circuit court of the United States for the southern district of New York.

Union Trust Company of New York, trustee for the children of Wm. Orton, deceased,
*against*
Connecticut Mutual Life Insurance Company.

Miller & Peckham, pl'ff's att'ys; Beach & Brown, def'ts att'ys.

NEW YORK, *April 7th*, 1879.

On reading and filing the appearance of the Connecticut Mutual Life Insurance company, the defendant in the above-entitled action, by Beach & Brown, its attorneys therein, and certified copies of the order of the supreme court of the state of New York, in and for the city and county of New York, ordering the removal of said action from that court into this court of all process served on said defendant in said state court, and of the record of said suit in said supreme court, the originals of which remain on file in the office of the clerk of the city and county of New York, and of said supreme court for said city and county, in the county court-house in said city,
32 now on motion of Messrs. Beach & Brown, attorneys for said defendant, it is—

Ordered, that the above-entitled suit be, and the same hereby is, removed into this court, and that the same do proceed in this court

against said defendant as if the same had been brought in this court by original process thereof, and the appearance of said defendant is hereby entered therein.

BEACH & BROWN,
*Att'ys for Def't, No. 120 Broadway, N. Y.*

(Endorsed:) U. S. circuit court for the southern district of New York; Union Trust company of New York, trustee, &c., against Connecticut Mutual Life Ins. co.; copy; rule removing suit from N. Y. supreme court into above-named court, & notice of en-
33 try of original thereof; Beach & Brown, att'ys for def't, 120 Broadway, N. Y.

SIRS: Please take notice that a rule, of which the within is a copy, was this day entered in the common rule book of the above-named court, in the office of the clerk of said court, in the U. S. court-house & post-office building in the city of New York.

N. Y., April 7th, 1879.

Y'rs, &c., BEACH & BROWN,
*Att'ys for Def't.*

To Messrs. MILLER & PECKHAM, *Pl'ff's Att'ys.*

Rec'd April 7, '79.

34 Circuit court of the United States for the southern district of New York.

Union Trust Company of New York, trustee for the children of William Orton, deceased, plaintiff,
*against*
The Connecticut Mutual Life Insurance Company, defendant.

The answer of the Connecticut Mutual Life Insurance company, the defendant in the above-entitled action, to the complaint of the Union Trust company of New York, trustee for the children of William Orton, deceased, the plaintiff therein.

First. This defendant admits that the plaintiff is a corporation duly organized under the statutes of the state of New York.

Second. This defendant admits that it is a corporation duly organized under the laws of the state of Connecticut as a life insurance company, and authorized to do business in the state of New York.

35 Third. This defendant admits and avers that on or about the 21st day of February, 1878, upon the application of one William Orton, it made and delivered to said William Orton its policy of insurance numbered 148,968, and a copy of which is hereto annexed and marked "A," and thereby, in consideration of the representations and declarations made to it in said application and of the premium then paid, and of the annual payment of two hundred and fifty-seven 65-100 dollars to be paid on or before the 21st day of

February in every year thereafter, it insured the life of the said Orton in the amount of five thousand dollars, and promised and agreed to pay, or cause to be paid, at the city of Hartford, Connecticut, the said sum so insured to the Union Trust company of New York in trust for the surviving children of the said insured, share and share alike, or its successors, within ninety days after due notice and satisfactory evidence of the death of said Orton during the continuance of said policy.

Fourth. This defendant admits that the said William Orton
36 died on or about the 22d day of April, 1878, and that thereafter a notice and papers purporting to be proofs of the death of said Orton were received by the defendant, and that more than ninety days have elapsed since the receipt of the same, and that plaintiff has demanded the payment of said sum of five thousand dollars, and that no part thereof has been paid.

Fifth. And this defendant upon information and belief denies each and every allegation in the said complaint not hereinbefore admitted.

Sixth. And for a second and separate defence to the cause of action alleged in the said complaint, this defendant, repeating and adopting the admissions and allegations made in the first defence touching the corporate character of the parties, the issuing of said policy and the consideration thereof, the death of the insured, the receipt of papers purporting to be proofs of death, and the demand for payment, avers and states that the said policy was issued and the agreement for insurance made in consequence of the representations made to it in the application for said policy, and the statements respecting the person and health of the said William Orton, a
37 copy of which application is hereto annexed, marked "B," and forms a part of this answer.

That the defendant relied upon the truth of the answers, statements, and representations contained in said application, and each of them, in so issuing said policy; and that in and by the said policy it was among other things expressly understood and agreed by and between the said William Orton and the defendant that the said policy was issued and accepted upon the express conditions and agreements that the answers, statements, representations and declarations contained in or indorsed upon said application for said insurance, which application was thereby referred to and made a part of said contract of insurance, were *warranted* by the assured to be true in all respects; and that if the said policy had been obtained by or through any fraud, misrepresentation, or concealment, then said policy should be absolutely null and void; and, further, that no answer, statement, representation, or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, should be taken or considered as having been made to or brought to the notice or knowledge of the defendant; and that the
38 defendant should be held and considered as having no notice or knowledge of such answer, statement, representation, or

declaration, and that said application, a copy of which was to said policy annexed, should be taken and held to be and to contain the only answers, statements, representations, or declarations made to the defendant in behalf of said insurance, and that in every case in which said policy should cease and determine, or should be or become null and void, all premiums paid in respect of the same should be forfeited to the defendant, as by reference to the said policy of insurance will more fully and at length appear. That the statements in the seventh, eighth, fourteenth, and sixteenth interrogatories and answers in the said application to the effect that the said William Orton had never had piles, affection of the liver, or habitual headache; that the only illness, local disease, or personal injury which he had had was colic for one day in October, 1877, with no recurrence, and that his general health was good; that he was last attended by a physician in October, 1877, and that was for colic, of which he was sick but one day, and that the only physician then attending
39 him was Dr. Hasbrouck of Dobb's Ferry; and that he had reviewed all of the answers to the questions in said application and that they were correct; were, and each of them was, as this defendant is informed and believes, false and untrue and so known to be by the said William Orton; that this defendant is informed and believes and therefore states that at the time of the making and delivery of the said application and of the issuing of said policy the general health of the said William Orton was not good; that for many years immediately prior thereto he had suffered with piles, affection of the liver, and habitual headache; that within less than eighteen months prior to said affection he had been seriously ill and confined to his house for several weeks, during which time several physicians attended him; that the illness in October, 1877, continued for several days instead of for one day; that he had visited the continent of Europe upon one or more occasions for the benefit of his health, and that by reason of disease he was much enfeebled in body; but this defendant avers that at the time of issuing said policy of insurance it did not know and had no reason to
40 believe that the said statements, answers, and declarations, or any of them, were untrue, but on the contrary it believed them and each of them to be true, and that it relied upon the truth thereof when it issued said policy; and this defendant claims and insists that by reason of the premises and of the facts aforesaid the said policy was and is absolutely null and void.

Seventh. And for a third and separate defence this defendant, referring to and adopting each and every the statements and allegations made and contained in the second defence herein as part of this defence, and claiming the benefit thereof as if the same and each of them was here repeated, avers and states that in and by the said application, which was mentioned and referred to and was made a part of said policy of insurance as aforesaid, it was stated and declared that each of the answers and statements therein was correct and true, and that there was not, to the knowledge of the insured,

any fact relating to his physical condition, personal or family history or habits, which had not been stated in answer to the questions in said application, and with which the officers of the defendant ought to be made acquainted. And this defendant avers that the
41 facts in the second defence herein stated, to wit, that the said William Orton had been and was subject to and afflicted with each of the diseases therein specified; had had a very serious illness and been attended by several physicians; had, in October, 1877, been ill much longer than was stated in said application, and had visited Europe for his health, were, and each of them was, within the knowledge of the said William Orton, and were, and each of them was, a material circumstance in relation to the past and present state of his health, habits of life, or condition, which rendered an insurance on his life more than usually hazardous and a material fact with which the officers of the defendant should have been made acquainted, and that the same were, and each of them was, concealed and withheld from, and was misrepresented to, the defendant by the said William Orton, whereby this defendant was injuriously influenced, and was induced to omit examinations and precautions relating to the condition and health of the said William Orton which would have prevented it from issuing the policy aforesaid upon the consider-
42 ations and conditions on which the same was issued as aforesaid, and otherwise injured this defendant; and this defendant claims and insists that by reason of such concealment, withholding, and misrepresentation, the said policy was and is absolutely null and void.

Wherefore the defendant demands that the said complaint be dismissed with costs.

BEACH & BROWN,
*Att'ys for Def't*, 120 *Broadway, N. Y.*

CITY & COUNTY OF NEW YORK, *ss.*

Philip S. Miller, being duly sworn, says that he is general agent in the city of New York of the Connecticut Mutual Life Insurance company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

PHILIP S. MILLER.

43 Sworn to before me this 30th day of April, 1879.

[SEAL.] GEO. W. MARK,
*Notary Public* (31) *N. Y. Co.*

44 "A."

No. 148,968.] The Connecticut Mutual Life Insurance Company of [$5,000

Age, 52.] Hartford, Conn., [Premium, $257.65

In consideration of the representations and declarations made to them in the application for this insurance, and of the annual premium of two hundred and fifty-seven dollars and sixty-five cents, to be paid to them on or before the twenty-first day of February in every year during the continuance of this policy, do hereby insure the life of William Orton, (the insured,) of New York, county of New York and state of New York, for the term of his natural life, in the sum of five thousand dollars, the said sum insured to be paid at the office of this company in Hartford, Conn., to the Union Trust co. of New York in trust for the surviving children of the said insured, share and share alike, or its successors, within ninety days after due notice and satisfactory evidence of the death of the said insured during the continuance of this policy, any balance of the year's premium, when not all paid at the beginning of the year, or any other indebtedness to this company on account of this policy, being first deducted therefrom.

This policy is issued and accepted upon the following express conditions and agreements:

1st. That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void; and further, that no answer, statement, representation, or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made to or brought to the notice or knowledge of this company; and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation, or declaration; and the said application—a copy of which is hereto annexed—shall be taken and held to be and to contain the only answers, statements, representations, or declarations made to this company in behalf of this insurance.

2d. That this policy shall not take effect until the advance premium hereon shall have been actually paid during the lifetime of the insured; and that if any subsequent premium or instalment of premium on this policy be not paid when due, then this policy shall cease and determine, and this company shall not be liable for the payment of the sum insured herein, nor of any part thereof; and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor, signed by the president or secretary of the company.

3d. That the said insured is, under this policy, freely permitted to reside in any civilized abode in the western hemisphere lying north of the thirty-second parallel of north latitude, in the United States lying south of said thirty-second parallel, (excepting from the first day of July to the first day of November,) and in the eastern hemisphere lying north of the forty-second parallel of north latitude, and west of the fortieth meridian of longitude, east from Greenwich; and he may also pass as a passenger, by usual routes and means of public conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits, or shall be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of highly inflammable or explosive substances, or as an employé in any capacity upon service on any sea, sound, inlet, river, lake or railroad, or if he shall enter into any military or naval service whatsoever, whether voluntarily or otherwise, (the militia, when not in actual service, alone excepted,) without the consent of this company previously given in writing, in each or either of the foregoing cases; or if he shall die by suicide, or in consequence of his violation of any law, or if he shall become so far intemperate as to impair his health or induce delirium tremens, or if he shall be convicted of felony—then, in each and every of the foregoing cases, this policy shall become and be null and void.

4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect of the same shall be forfeited to this company.

5th. That no assignment of this policy shall be valid, unless made in writing, indorsed hereon; and that any claim against this company, arising under this policy, made by any assignee, shall be subject to proof of interest.

6th. That if, after the payment of two or more annual premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then this company will grant a paid-up policy, payable as above, for such amount as the then present value of this policy will purchase as a single premium: Provided, That this policy shall be transmitted to and received by this company, and application made for such paid-up policy during the lifetime of the said insured, and within one year after default in the payment of premium thereon shall first be made.

7th. That the sum of ——— dollars of the first annual premium hereon is acknowledged as an indebtedness against this policy—at six per cent. interest, payable annually—until paid or cancelled by dividends, and that said indebtedness shall be due and payable at the maturity or other settlement of this policy.

In witness whereof the said Connecticut Mutual Life Insurance company have, by their president and secretary, signed and deliv-

ered this contract in the city of Hartford, this twenty-first day of February, A. D. one thousand eight hundred and seventy-eight.

E. B. WATKINSON,
*Vice-President.*

JOHN M. TAYLOR,
*At. Secretary.*

☞ Agents of the company have no authority to make, alter, or change any condition of the policy, nor to waive forfeitures thereof.

Ex'd, J.
Own Ann. Life.

[Printed on margin:] Please Notice. That upon the third page of this policy is a full copy of the application upon the faith of which it is issued, and which is a part of the contract of insurance. In case of any error or omission in any answer or statement therein made, the policy, with the proper correction of the application, must be at once returned, addressed to "The Secretary of the Conn. Mutual Life Ins. Co., Hartford, Conn.," for the further consideration and action of the company.

45 "B."

*Application for insurance in the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut.*

[In square in corner:] These blanks are to be filled at the home office. No. 148,968; age, 52 yrs.; am't, $5,000; ann. prem., $257.65; A. P. life, table A; policy dated Feb'y 21st, 1878; policy written by E Agents must not fill the above blanks.

Statement of particulars by the person whose life is proposed for insurance, which forms a part of the contract of insurance.

1. Name of the person whose life is proposed for insurance. (Write the name in full.)—William Orton.

Occupation. (To be stated specifically.)—President "Wes. Un. Tel. Co."

Residence.—Place, New York; county, New York; state, New York.

2. A. How much insurance is desired?—Ans. $5,000 (five thousand dollars.)

B. Is the policy to be for the term of life?—Ans. Yes.

C. Are the premiums to be payable during the whole term of the policy?—Ans. Yes, by table A.

D. Is the premium to be paid annually or semi-annually?—Ans. Annually.

E. Is the premium to be paid in full in cash, or with part credit for the first year?—Ans. All cash.

3. A. When and where were you born?—Ans. In Cuba; state or country, Allegany co., N. Y.; on the 14th day of the month of June, in the year 1826.

B. What will be your age at next birthday?—Ans. 52 years.

Are you married?—Ans. Yes.

4. A. Is there now any insurance on your life?—Ans. Yes.

B. If in this company state the No. of policy and amount?—Ans. For $10,000.

C. If in other companies state the name of each company and amount insured in each? Ans. In the Northwestern co. for $20,000; in the Mutual Life co. for $6,000; in the Manhattan co. for $10,000; in the Ætna co. for $5,000.

D. Has any company ever *declined* to grant insurance on your life?—Ans. Yes.

If so, what company and how long since?—Ans. U. S. Life, last Nov., 1877.

E. Has any opinion ever been sought from, or any consultation ever held with, any officer of any life insurance company, or any physician or surgeon as to whether your life was safely insurable?—Ans. Yes.

F. If so, was any decision or opinion given that you were, or that you were not, safely insurable?—Ans. Suspended for fistula by N. Y. Life in 1873; insured five times.

5. A. Have you ever resided out of the United States?—Ans. No.

B. Or south of the southerly line of Tennessee?—Ans. No.

6. A. Have you been successfully vaccinated?—Ans. Yes.

B. What is the present state of your health?—Ans. Good.

7. Have you ever had any of the following diseases? Answer (yes or no) opposite each.

Apoplexy?—No.
Paralysis?—No.
Insanity?—No.
Epilepsy?—No.
Habitual headache?—No.
Fits?—No.
Consumption?—No.
Pneumonia?—No.
Pleurisy?—No.
Diphtheria?—No.
Bronchitis?—No.
Spitting of blood?—No.
Habitual cough?—No.
Asthma?—No.
Scarlet fever?—No; W. O.
Dyspepsia?—No.
Colic?—Yes.
Rupture?—No.

Fistula?—Yes.
Piles?—No.
Affection of liver?—No.
Affection of spleen?—No.
Fever and ague?—Yes.
Disease of the heart?—No.
Palpitation?—No.
Aneurism?—No.
Disease of the urinary organs?—No; W. O.
Syphilis?—No.
Rheumatism?—No.
Gout?—No.
Neuralgia?—No.
Dropsy?—No.
Scrofula?—No.
Small-pox?—No.
Yellow fever?—No.
Cancer, or any tumor?—No.

State the number of attacks, character, and duration of all the diseases which you have had.—Had fistula in 1871, induced by intermittent fever; radically cured.

8. Have you had any other illness, local disease, or personal injury? And if so, of what nature, how long since, and what effect on general health?—Had colic for one day, Oct., 1877; no recurrence; general health good.

9. Is there now existing any disorder, or any infirmity, or weakness?—Not to my knowledge.

10. Are you, or have you ever been, addicted to the use of alcoholic beverages, opium, or other stimulants?—No.

11. State your family history.
Mother living; age, 72; health, good.
1 brother living; age, 50.
4 sisters living; ages, 30 to 45; health, good.
Grandparents dead; ages, 75 to 90; cause of death, old age.
Father dead; age, 77.
2 brothers dead; ages, 25; cause of death, small-pox, spinal fever.
1 sister dead; age, 16; cause of death, aneurism.

12. A. Has any branch of your family been subject to insanity, or to any pulmonary, scrofulous, or other hereditary disease?—A. No.
B. Have your ancestors generally reached old age?—B. Yes.

13. Are you now, or have you ever been, in any military or naval service? If so, when, how long, and in what capacity?—No.

14. How long since you were attended by a physician? For what diseases? Give name and residence of such physician.—Oct., 1877; for colic; Doct. Hasbrouck, of Dobbs' Ferry; sick one day.

Name and residence of your usual medical attendant.—William J. Baner, New York, has known me years.

Name and residence of an intimate friend.—O. H. Palmer, Mutual Life, New York, has known me 12 years.

15. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the officers of the company ought to be made acquainted?—No; nothing to my knowledge.

16. Have you reviewed the answers to the above questions, and are you sure that they are correct?—Yes.

17. For whose benefit is this insurance to be effected?—"Union Trust company, N. Y.," trustee in trust for my surviving children, share and share alike.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and that no statements respecting the physical condition, habits, personal or family history of the person whose life is proposed for insurance, other than those above made, have been made to any agent, solicitor, examiner, or other person in behalf of the company; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company. And it is further declared by the undersigned that the party making this application has an "insurable interest" in the life above proposed for insurance to the full amount above applied for.

Dated at New York this 18th day of Feb'y, 1878.

THE UNION TRUST CO. OF NEW YORK,
*Trustee, &c.,*

By WILL'M ORTON.
WILLIAM ORTON.

Witness to the signing hereof:
HIRAM P. CROZIER.

46 [Endorsed on policy:] No. 148,968; The Connecticut Mutual Life Insurance company; sum insured, $5,000 on the life of William Orton; annual premium, $257.65; cash premium, $257.65. The annual premium on this policy is due and payable on the twenty-first day of February.

PLEASE NOTICE.—The premiums on this policy will be due and payable at the office of the company, in Hartford, Conn., and not elsewhere, unless for the time being to an agent of the company, to whom the receipt for the renewal premium for any year may be sent for

collection; but the receipt of premiums through an agent shall not be held to establish any binding precedent or custom as to the place of payment of premiums.

The assured is hereby notified that the only evidence to him of the authority of any agent to receive any premium on account of this policy is a receipt in printed form, signed by the president or secretary of the company.

Notice of premiums falling due are sent as regularly as possible, but not as a matter of agreement, but for convenience only and without any responsibility for omission or miscarriage.

PROOFS OF DEATH REQUIRED.—Blanks for the several certificates required to be made in proof of death will be furnished upon request.

Statute of Connecticut respecting policies of insurance issued for the benefit of married women.

SEC. 36. A policy of life insurance expressed to be for the benefit of a married woman, or assigned to her in trust for her, shall inure to her separate use, or, in case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy: *Provided*, That if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premium; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy.

47 [Endorsed:] U. S. circuit court, southern district of N. Y.; Union Trust company of New York, trustee, &c., *ag'st* The Connecticut Mutual Life Insurance company; answer; Beach & Brown, attorneys for defendant, 120 Broadway, N. Y.; U. S. circuit court; filed May 1, 1879; John I. Davenport, clerk; Ex. A, Jan'y 20, '81.

48 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Friday, the 21st day of January, in the year of our Lord one thousand eight hundred and eighty-one—

Present: The Honorable Nathaniel Shipman, judge.

The Union Trust Company of New York, trustee, &c.,
*vs.*
The Connecticut Mutual Life Insurance Company.

This case being still on trial, the jurors sworn in it are called and severally answer to their names.

William A. Beach, esq., of counsel for the defendant, sums up the case on the part of the defendant.

Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on
49 their return say that they find a verdict for the plaintiff for the sum of five thousand seven hundred and sixty-seven dollars and ninety-one cents; and so say they all.

On motion of Mr. Brown, ordered that the defendant have a stay of proceedings herein for thirty days, within which to prepare and serve a bill of exceptions herein.

A copy from the minutes.

JOSEPH M. DEUEL, *Clerk.*

(Endorsed:) C. c. of the U. S., s. d. of N. Y. The Union Trust company of New York, trustee, &c., *vs.* The Connecticut Mutual Life Ins. co. Certified transcript from minutes.

50 In the circuit court of the United States for the southern district of New York.

*Judgment.*—April, 1881.

Union Trust Company of New York, trustee for the children of William Orton, deceased, plaintiff,
*ag'st*
Connecticut Mutual Life Insurance Company, defendant.

This action having been brought in the supreme court of the state of New York in and for the city and county of New York, and the defendant having appeared therein and filed in said supreme court a petition and bond for the removal of this action into this court, and an order of said supreme court having been made and entered on the 30th day of November, 1878, approving said bond and removing said action into this court, and said defendant having entered its appearance in this court and entered a rule therein that this action do proceed in this court against the said defendant as if the same
51 had been brought in this court by original process thereof, and this cause having been at issue and regularly placed upon the calendar of this court, and the same having been tried before Hon. Nathaniel Shipman and a jury at a stated term of said circuit court on the 21st day of January, 1881, and the jury having rendered a verdict in favor of the plaintiff for the sum of five thousand seven hundred and sixty-seven dollars and ninety-one cents, and plaintiff's costs having been duly adjusted at one hundred and thirty-six 61-100 dollars, including interest on said verdict:

Now, on motion of Miller and Peckham, attorneys for plaintiff—

It is considered and adjudged that the plaintiff, the Union Trust company of New York, trustee for the children of William Orton, deceased, do recover of the defendant, the Connecticut Mutual Life Insurance company, the sum of five thousand nine hundred and four

dollars and fifty-two cents, and that plaintiff have execution against the defendant therefor.

Judgment signed this 18th day of April, A. D. 1881.

J. M. DEUEL, *Clerk.*

52 (Endorsed:) United States circuit court. Union Trust company, as trustee, &c., *vs.* Connecticut Mutual Life Insurance company. Judgment roll. Miller & Peckham, att'vs for pl'ff, 29 Wall st., N. Y. city. Principal & interest $5,849.60; costs $54.92—$5,904.52. U. S. circuit court. Filed April 18, 1881. Joseph M. Deuel, clerk.

53 United States circuit court, southern district of New York.

Union Trust Company of New York, as trustee, &c.,
*against*
The Connecticut Mutual Life Insurance Company.

*Defendant's bill of exceptions.*

This cause came regularly on for trial on the 20th day of January, 1881, before Honorable Nathaniel Shipman, one of the judges of this court, and a jury, and the trial thereof was concluded on the 21st day of January, 1881.

Wheeler H. Peckham, esq'r, appeared for the plaintiff, and William A. Beach, esq'r, and A. C. Brown, esq'r, appeared for the defendant.

The following named jurors were empannelled:

1. James W. Davis.
2. Augustus Kirkham.
3. William H. Penfold.
4. Benjamin F. Romaine.
5. H. E. Merriam.

54 6. Rowland C. Anthony.
7. John G. Porter.
8. Kellogg H. Loomis.
9. Nicholas R. Conner.
10. Henry Wilson.
11. Theodore R. B. Degroot.
12. James W. Tappin.

Defendant's counsel inquired of the jury if any member held a policy of life insurance, and upon an affirmative response from several, he challenged the following-named jurors respectively for favor:

Augustus Kirkham, Nicholas R. Connor, Rowland C. Anthony, and Theodore R. B. Degroot, Henry Wilson.

Mr. Peckham traversed the challenge.

AUGUSTUS KIRKHAM, being duly sworn and examined touching his qualifications to act as a juror in this case, testified:

By Mr. BEACH:

Q. Have you an insurance on your life?
A. Yes, sir.
Q. Effected in what company?
A. I have two; one in the Mutual and one in the New York Life.

Q. In effecting this insurance you signed the ordinary application for insurance?

A. Yes, sir.

By Mr. PECKHAM:

55 Q. In making that application and signing those statements you made true representations and a true warranty?

A. Yes, sir.

The COURT: I don't think I can exclude the juror.

(To this decision of the court the defendant's counsel duly excepted.)

The like challenge was made to each of the other four jurors, and was in each case overruled on the same testimony, and in each case defendant's counsel duly excepted.

Counsel for the respective parties agreed that $5,767.91 was the amount, if any, due upon the policy.

Counsel for the defendant thereupon claimed that upon the pleadings the defendant had the affirmative, and was entitled to open and close the case, which claim the court allowed.

Counsel for the defendant then read in evidence the record of the removal of the cause from the supreme court of the state of New York to this court, but no question arising thereon, the same
56 is omitted from this bill of exceptions.

Counsel for the defendant then read in evidence the following application for insurance in the Connecticut Mutual Life Insurance company, the signature to which was admitted by plaintiff's counsel to be correct and in the handwriting of William Orton, the insured.

57 *Application for insurance in the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut.*

[In square in corner:] These blanks are to be filled at the home office. No. 148,968; age, 52 yrs.; am't, $5,000; ann. prem., $257.65; A. P. life, table A; policy dated Feb'y 21st, 1878; policy written by E. Agents must not fill the above blanks.

Statement of particulars by the person whose life is proposed for insurance, which forms a part of the contract of insurance.

1. Name of the person whose life is proposed for insurance. (Write the name in full.)—William Orton.

Occupation. (To be stated specifically.)—President "Wes. Un. Tel. Co."

Residence.—Place, New York; county, New York; state, New York.

2. A. How much insurance is desired?—Ans. $5,000 (five thousand dollars.)

B. Is the policy to be for the term of life?—Ans. Yes.

C. Are the premiums to be payable during the whole term of the policy?—Ans. Yes, by table A.

D. Is the premium to be paid annually or semi-annually?—Ans. Annually.

E. Is the premium to be paid in full in cash, or with part credit for the first year?—Ans. All cash.

3. A. When and where you were born?—Ans. In Cuba; state or country, Allegany co., N. Y.; on the 14th day of the month of June, in the year 1826.

58 B. What will be your age at next birthday?—Ans. 52 years.

Are you married?—Ans. Yes.

4. A. Is there any insurance on your life?—Ans. Yes.

B. If in this company state the No. of policy and amount.—Ans. For $10,000.

C. If in other companies state the name of each company and amount insured in each.—Ans. In the Northwestern co. for $20,000; in the Mutual Life co. for $6,000; in the Manhattan co. for $10,000; in the Ætna co. for $5,000.

D. Has any company ever *declined* to grant insurance on your life?—Ans. Yes.

If so, what company and how long since?—Ans. U. S. Life, last Nov., 1877.

E. Has any opinion ever been sought from, or any consultation ever held with, any officer of any life insurance company, or any physician or surgeon as to whether your life was safely insurable?—Ans. Yes.

F. If so, was any decision or opinion given that you were, or that you were not, safely insurable?—Ans. Suspended for fistula by N. Y. Life in 1873; insured five times.

5. A. Have you ever resided out of the United States?—A. Ans. No.

B. Or south of the southerly line of Tennessee?—B. Ans. No.

6. A. Have you been successfully vaccinated?—Ans. Yes.

B. What is the present state of your health?—Ans. Good.

7. Have you ever had any of the following diseases? Answer (yes or no) opposite each.

59 Apoplexy?—No.
Paralysis?—No.
Insanity?—No.
Epilepsy?—No.
Habitual headache?—No.
Fits?—No.
Consumption?—No.
Pneumonia?—No.
Pleurisy?—No.
Diphtheria?—No.
Bronchitis?—No.
Spitting of blood?—No
Habitual cough?—No.

Asthma?—No.
Scarlet fever?—No; W. O.
Dyspepsia?—No.
Colic?—Yes.
Rupture?—No.
Fistula?—Yes.
Piles?—No.
Affection of liver?—No.
Affection of spleen?—No.
Fever and ague?—Yes.
Disease of the heart?—No.
Palpitation?—No.
Aneurism?—No.
Disease of the urinary organs?—No; W. O.
Syphilis?—No.
Rheumatism?—No.
Gout?—No.
Neuralgia?—No.
Dropsy?—No.
Scrofula?—No.
Small-pox?—No.
Yellow fever?—No.
Cancer, or any tumor?—No.

State the number of attacks, character, and duration of all the diseases which you have had.—Had fistula in 1871, induced by intermittent fever; radically cured.

8. Have you had any other illness, local disease, or personal injury? And if so, of what nature, how long since, and what effect on general health?—Had colic for one day, Oct., 1877; no recurrence; general health good.

9. Is there now existing any disorder, or any infirmity, or weakness?—Not to my knowledge.

10. Are you, or have you ever been, addicted to the use of alcoholic beverages, opium, or other stimulants?—No.

11. State your family history.

60 Mother living; age, 72; health, good.
1 brother living; age, 50.
4 sisters living; ages, 30 to 45; health, good.
Grandparents dead; ages, 75 to 90; cause of death, old age.
Father dead; age, 77.
2 brothers dead; ages, 25; cause of death, small-pox, spinal fever.
1 sister dead; age, 16; cause of death, aneurism.

12. A. Has any branch of your family been subject to insanity, or to any pulmonary, scrofulous, or other hereditary disease?—A. No.
B. Have your ancestors generally reached old age?—B. Yes.

13. Are you now, or have you ever been, in any military or naval service? If so, when, how long, and in what capacity?—No.

14. How long since you were attended by a physician? For what

disease? Give name and residence of such physician.—Oct., 1877; for colic; Doct. Hasbrouck, of Dobbs' Ferry; sick one day.

Name and residence of your usual medical attendant.—William J. Baner, New York, has known me years.

Name and residence of an intimate friend.—O. H. Palmer, Mutual Life, New York, has known me 12 years.

15. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the officers of the company ought to be made acquainted?—No; nothing to my knowledge.

16. Have you reviewed the answers to the above questions, and are you sure that they are correct?—Yes.

17. For whose benefit is this insurance to be effected?—
61 "Union Trust company, N. Y.," trustee in trust for my surviving children, share and share alike.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and that no statements respecting the physical condition, habits, personal or family history of the person whose life is proposed for insurance, other than those above made, have been made to any agent, solicitor, examiner, or other person in behalf of the company; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company. And it is further declared by the undersigned that the party making this application has an "insurable interest" in the life above proposed for insurance to the full amount above applied for.

Dated at New York this 18th day of Feb'y, 1878.

THE UNION TRUST CO. OF NEW YORK,
*Trustee, &c.,*

By WILL'M ORTON.
WILLIAM ORTON.

Witness to the signing hereof:
HIRAM P. CROZIER.

62 (Endorsed:) No. 148,968; Life of William Orton; Connecticut Mutual Life (Vignette) Insurance Company of Hartford, Conn. Before forwarding this application see that every question is fully answered; that every name is legibly written in full; that every needed signature is properly attached and witnessed. If the application be found in any respect imperfect, it will be returned for completion; and no policy will be granted until every requirement is complied with. Miller & Goodwin, N. Y. city. (Leave blank.) Rec'd Feb'y 19th, 1878.

63 Counsel for the defendant then read in evidence the policy of insurance, dated February 21, 1878, upon which the action was brought, together with a copy of the application for insurance attached thereto. The application was a copy of the application above embraced in this bill of exceptions, and is therefore not again inserted. The policy was as follows:

No. 148,968.] The Connecticut Mutual Life Insurance Company of Hartford, Conn., [$5,000

Age, 52.] [Premium, $257.65

In consideration of the representations and declarations made to them in the application for this insurance, and of the annual premium of two hundred and fifty-seven dollars and sixty-five cents, to be paid to them on or before the twenty-first day of February in every year during the continuance of this policy, do hereby insure the life of William Orton, (the insured,) of New York, county of New York and state of New York, for the term of his natural life, in the sum of five thousand dollars, the said sum insured to be paid at the
64 office of this company in Hartford, Conn., to the Union Trust co. of New York in trust for the surviving children of the said insured, share and share alike, or its successors, within ninety days after due notice and satisfactory evidence of the death of the said insured during the continuance of this policy, any balance of the year's premium, when not all paid at the beginning of the year, or any other indebtedness to this company on account of this policy, being first deducted therefrom.

This policy is issued and accepted upon the following express conditions and agreements:

1st. That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be
65 absolutely null and void; and further, that no answer, statement, representation, or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made to or brought to the notice or knowledge of this company; and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation, or declaration; and the said application—a copy of which is hereto annexed—shall be taken and held to be and to contain the only answers, statements, representations, or declarations made to this company in behalf of this insurance.

2d. That this policy shall not take effect until the advanced premium shall have been actually paid during the lifetime of the insured; and that if any subsequent premium or instalment of premium on this policy be not paid when due, then this policy shall

cease and determine, and this company shall not be liable for
66 the payment of the sum insured herein, nor of any part thereof; and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor, signed by the president or secretary of the company.

3d. That the said insured is, under this policy, freely permitted to reside in any civilized abode in the western hemisphere lying north of the thirty-second parallel of north latitude, in the United States lying south of said thirty-second parallel, (excepting from the first day of July to the first day of November,) and in the eastern hemisphere lying north of the forty-second parallel of north latitude, and west of the fortieth meridian of longitude, east from Greenwich; and he may also pass as a passenger, by usual routes and means of public conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits, or shall
67 be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of highly inflammable or explosive substances, or as an employé in any capacity upon service on any sea, sound, inlet, river, lake or railroad, or if he shall enter into any military or naval service whatsoever, whether voluntarily or otherwise, (the militia, when not in actual service, alone excepted,) without the consent of this company previously given in writing, in each or either of the foregoing cases; or if he shall die by suicide, or in consequence of his violation of any law, or if he shall become so far intemperate as to impair his health or induce delirium tremens, or if he shall be convicted of felony—then, in each and every of the foregoing cases, this policy shall become and be null and void.

4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect of the same shall be forfeited to this company.

5th. That no assignment of this policy shall be valid unless made in writing, indorsed hereon; and that any claim against this
68 company, arising under this policy, made by any assignee, shall be subject to proof of interest.

6th. That if, after the payment of two or more annual premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then this company will grant a paid-up policy, payable as above, for such amount as the then present value of this policy will purchase as a single premium: Provided, That this policy shall be transmitted to and received by this company, and application made for such paid-up policy during the lifetime of the said insured, and within one year after default in the payment of premium thereon shall first be made.

7th. That the sum of ——— dollars of the first annual premium hereon is acknowledged as an indebtedness against this policy—at six per cent. interest, payable annually—until paid or cancelled by

dividends, and that said indebtedness shall be due and payable at the maturity or other settlement of this policy.

[Printed on margin:] Please notice, That upon the third page of this policy is a full copy of the application upon the faith of which it is issued, and which is a part of the contract of insurance. In case of any error or omission in any answer or statement therein made, the policy, with the proper correction of the application, must be at once returned, addressed to the Secretary of the Conn. Mutual Life Ins. Co., Hartford, Conn., for the further consideration and action of the company.

69 In witness whereof the said Connecticut Mutual Life Insurance company have, by their president and secretary, signed and delivered this contract in the city of Hartford, this twenty-first day of February, A. D. one thousand eight hundred and seventy-eight.

E. B. WATKINSON,
*Vice-President.*

JOHN M. TAYLOR,
*At. Secretary.*

Agents of the company have no authority to make, alter, or change any condition of the policy, nor to waive forfeiture thereof.

Ex'd, J.; own. ann. life.

(Endorsed:) Proofs of death required; blanks for the several certificates required to be made in proof of death will be furnished upon request.

Counsel for the defendant then read in evidence the proofs of death verified on the 18th of June, 1878, and received by the defendant from the plaintiff about June 20th, 1878, as follows:

70 The Connecticut Mutual Life Insurance company.

No. 1.—*Claimant's Certificate.*

Claimant's name and residence.—Union Trust company of New York, trustee for the surviving children of William Orton.

Number, date, and amount of policy.—No. 108,890; date December 12th, 1870; $10,000: 148,968, Feb'y 21st, 1878; $5,000.

In what capacity or by what title do you make the claim?—Trustee as above.

Name of deceased in full.—William Orton.

How long had you known deceased?—Nine years.

Residence of deceased since above policy was issued.—New York city and Irvington, N. Y.

The several occupations of deceased since the above policy was issued.—President Western Union Tel. Co.

Place and date of birth of deceased.—Cuba, N. Y., June 14th, 1826.

Place and date of death.—New York city, April 22d, 1878.

A. Remote cause of death.—A. Several attacks of malarial fever.

B. When did health of deceased first begin to be affected?—

71 B. Am unable to state.

C. Immediate cause of death.—C. Apoplexy.

D. Duration of last illness.—D. About eight hours.

E. Give every particular in relation thereto within your knowledge.—E. I have done so as above.

Name and residence of every physician who attended or prescribed for deceased during the last year prior to death, or since he became out of health.—W. J. Baner, M.D., N. Y.; Dr. Hasbrouck, Dobbs' Ferry, N. Y.

Did the deceased violate any condition of the above mentioned policy in respect to residence, travel, occupation, use of spirituous liquors, dwelling, suicide, violation of law, or had he been convicted of felony?—No.

72 (Signed:) UNION TRUST COMPANY OF NEW YORK,
*Trustee of surviving children of William Orton,*
By EDW'D KING, *President.*

*Oath.*

STATE OF NEW YORK, }
*County of New York,* } *ss.*

On this eighteenth day of June, A. D. 1878, personally appeared before me the above named Edward King, president of the Union Trust company, to me known, and made oath that the answers by him above made and subscribed are true and full to the best of his knowledge and belief.

JNO. V. B. THAYER,
[SEAL.] *Notary Public* (30) *city and county of New York.*

STATE OF NEW YORK, }
*City and county of New York,* } *ss.*

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that John

73 V. B. Thayer, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said state and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 19th day of June, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

No. 2.—*Attending Physician's Certificate.*

All answers must be in the physician's own handwriting.

How long have you practiced as a physician, and where did you receive your medical education?—About twenty-one years, and received my medical education in New York city.

Name of deceased.—William Orton.

Place and date of death.—413 West 23rd st.; April 22nd, 1878.

How long have you known deceased?—Over seven years.

71 How long have you been his usual medical adviser?—Over seven years.

Since you have known deceased—

A. What have been his several occupations?—A. President Western Union Telegraph co.

B. And his places of residence?—B. New York city and Irvington, N. Y.

Duration of last illness?—About eight hours.

Date of your first visit, or prescription, in last illness?—April 21st, 1878.

Date of last visit?—April 22nd, 1878.

A. State the remote cause of death; if from disease, give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress.—A. The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement.

B. State the immediate cause of death.—B. Cerebral apoplexy.

C. If from any cause other than disease, state the medical and other facts connected therewith.

75 D. Was a *post mortem* examination made; by whom, and with what results?—D. No.

Had deceased any other disease, acute or chronic, or had he ever had any injury or infirmity?—I think not.

Was there anything in his habits, or mode of life, predisposing him to disease?—Nothing except a tendency to overwork.

Did deceased use spirituous liquors?—In moderation.

A. To what extent?—A. Wine at dinner.

B. With what effect?—B. None, except slight exhilaration.

State the apparent age of deceased.—Fifty-two.

WM. J. BANER, 13 E. 33 S.

*Oath.*

STATE OF NEW YORK, }
*County of New York,* } ss.

On this twentieth day of May, A. D. 1878, personally appeared before me the above-named William J. Baner, a physician in

76 regular standing, and made affirmation that the answers by

him above made and subscribed are true and full to the best of his knowledge and belief.

J. ROMAINE BROWN,

[SEAL.] *Notary Public* (170) *city and county of New York.*

STATE OF NEW YORK, } ss.
*City and county of New York,* }

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that J. Romaine Brown, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said state, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and
77 affixed the seal of the said court and county the 19th day of June, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

No. 3.—*Friend's Certificate.*

Name of deceased in full.—William Orton.

Residence.—413 West 23d st., New York city.

Occupation.—President of the Western Union Telegraph co.

Date and place of death.—Morning of April 22nd, 1878; at home.

Cause of death.—Apoplexy.

Was the deceased insured in the Connecticut Mutual Life Insurance company?—Have no personal knowledge.

Number, date, and amount of policy.—No. 108,890; date Dec. 12, 1870; $10,000.

Do you know the deceased to be the person insured by the above-named policy by the name above given?—I knew William Orton personally, and knew he had insurance policy.

Have you any interest in the above policy?—I have no interest in the policy.

NORVIN GREEN.

78 *Oath.*

STATE OF NEW YORK, } ss.
*City and county of New York,* }

On this fifth day of June, A. D. 1878, personally appeared before me the above-named Norvin Green and made oath that the answers by him above made and subscribed are true and full to the best of his knowledge and belief.

CLARENCE CARY,

[SEAL.] *Notary Public New York city and county.*

STATE OF NEW YORK, }
*City and county of New York,* } *ss.*

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Clarence Cary, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said state and for
79 general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 19th day of June, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

No. 4.—*Undertaker's Certificate.*

Name of deceased.—William Orton.

Residence and occupation.—413 West 23rd st.; president of W. U. T. co.

Date of birth.—June 14th, 1826.

Date and place of death.—April 22nd, 1878; 413 West 23rd st.

Did you inter the deceased; when and where?—Yes, April 25th, 1878; Sleepy Hollow Cemetery.

Do you know the body interred by you to be that of the person named by you as the deceased?—Yes.

Your name, residence, and post-office address.—Samuel Hays, 296 9th av., New York city.

*Oath.*

80 STATE OF NEW YORK, }
*County of New York,* } *ss.*

On this third day of June, A. D. 1878, personally appeared before me the above named Samuel Hays, to me known, and made oath that the answers by him above made and subscribed are true and full to the best of his knowledge and belief.

[SEAL.] J. F. WILLIAMS,
*Notary Public* (4) *N. Y. co.*

STATE OF NEW YORK, }
*City and county of New York,* } *ss.*

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that J. F. Williams, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths

to be used in any court in said state, and for general pur-
81 poses, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 19th day of June, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

(Endorsed:) Instructions.

No. 1. Claimant's certificate is to be executed by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor or administrator of a deceased beneficiary, or as guardian or other legal representative of a minor, or as a trustee, or as assignee. In case of assignment, a sworn statement of interest must be made, and a copy of the assignment furnished. Executors, administrators, and guardians must send certified copies of their appointment and certificate of qualifications. Trustees, unless named in the policy, must exhibit their authority.

82 No. 2. Attending physician's certificate is to be executed by the physician attending the deceased in his or her last illness. If more than one physician were employed, the certificate of each must be obtained. The entire certificate must be in the handwriting of the physician.

No. 3. Friend's certificate is to be executed by some person intimately acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

No. 4. Undertaker's certificate is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the clergyman who officiated at the interment.

Every question must be distinctly and fully answered, and the company reserves the right to ask any further questions necessary under the circumstances of any particular case.

Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the clerk of a court of
83 record.

If the oath be administered in a foreign country, the official character of the person administering the same, or of the clerk or other officer of a court certifying thereto, must be authenticated by a consul or minister of the United States residing in such foreign country.

Counsel for the defendant then called as a witness JOSEPH HASBROUCK, who, being duly sworn, testified as follows:

By defendant's counsel:

Q. You are a physician?

A. I am.

Q. Residing where?
A. Dobbs' Ferry, N. Y.
Q. Were you located there in 1878?
A. I was.
Q. Did you know Mr. William Orton?
A. I did.
Q. How intimately?
A. I was their family physician when they resided at Irvington. They resided a part of the year at Irvington and a part of
84 the year in New York. When in Irvington I attended his family.
Q. During what years was that.
A. I attended his family from late in the fall of 1875 up to the present time. I came to Dobbs' Ferry in 1875.
Q. Did you call upon Mr. Orton personally in the fall of 1875?
A. Yes; he had a slight illness in the fall of 1875, and I called on him.
Q. What was the character of that illness?
(Plaintiff's counsel objects to the question as incompetent, inasmuch as it calls upon the witness to state facts learned in the course of his professional attendance upon Mr. Orton.)
The COURT: The question, "What was the character of the disease?" is not, of itself, objectionable, because it does not appear that the witness obtained his knowledge of the disease from or during his professional interviews. He might have known the nature of the disease before he was called professionally. But, as long as the question has been gone into at length, I will
85 state, after an examination of the authorities cited upon both sides, what I think the rule to be. I think the rule to be that information or knowledge acquired by a physician in his character as a physician, and while in attendance upon the patient for the purpose of medically treating him, which information or knowledge is derived from communications by the patient to the physician in his character of medical adviser for the purpose of obtaining medical aid, or from the physician's own observations at the time of his professional attendance upon the patient of the patient's appearance and symptoms, which observations were made in his character as physician and for professional purposes, is excluded.
(Defendant's counsel duly excepted.)
Q. Upon the occasion of the illness of which you speak, how long did you attend him; how many visits did you pay him?
A. I do not remember the exact number of visits, but it was a few.
86 Q. Who was present at the time you paid your visits to Mr. Orton?
A. I do not remember; I know that his wife was present; that is all I remember at that time.
Q. At the time of your first visit to him upon this occasion in 1875 was his wife present?

A. I think she was, but I cannot say positively.

Q. Can you state whether other persons were present?

A. I cannot state.

Q. Did you receive communications from his wife in regard to his illness?

A. No, sir.

Q. Were there any external symptoms which you observed in Mr. Orton at the time of your first visit which you can state?

(Objected to by plaintiff's counsel.)

By the COURT:

Q. Did you observe those external symptoms in your character as a physician and for professional purposes at that time?

A. I did.

(Question excluded. Defendant's counsel excepted.)

87 Mr. BEACH: This question is simply preliminary, and I do not think it is objectionable, although that which will follow the court may hold will be.

The COURT: I think it is a question which the witness can answer categorically, yes or no.

A. Yes, sir.

By Mr. BEACH:

Q. Please state what those symptoms were?

(Objected to by plaintiff's counsel.)

The COURT: It is excluded upon the hypothesis that the witness observed these symptoms in the course of his professional attendance upon Mr. Orton.

(Defendant's counsel duly excepted.)

Q. At the time of your several visits upon the occasion of his illness did you prescribe for him?

A. I did.

Q. Had you seen any of those symptoms previously?

A. No, sir.

Q. When did you attend him again?

A. In 1876.

Q. Where did you attend him upon that occasion?

A. At Irvington.

Q. What time in 1876 was that?

88 A. October, 1876.

Q. How long were you in attendance upon him on that occasion?

A. From the 19th of October until some time in November; I do not know the exact date.

Q. Can you tell about what time in November it was that you attended him?

A. I know that I was attending him the 10th of November, because I remember the World's Fair was in session at that time, and I could not go.

Q. How long after that you cannot tell?

A. It was along after that, or just about that time.

Q. Did he then pass from your care by removing from Irvington?

A. No, sir.

Q. Was Mr. Orton confined to his bed during this illness?

A. Yes.

Q. Did he remove to New York soon after your attendance upon him ceased?

A. Yes, sir.

Q. How soon after your last visit to him?

A. I don't remember exactly, but it was within a day or two.

89 Q. Will you say it was not on the same day of your last visit?

A. It may possibly have been the same day.

Q. Did your visits to him cease when he removed to New York?

A. Yes; they ceased when he removed to New York.

Q. Would you have continued to visit him at that illness if he had not removed to New York?

A. I probably would.

Q. Don't you know that upon his removal to New York he passed under the care of another physician in this city?

A. No, sir; I do not know.

Q. During that illness, and while you attended him, was there a consultation of physicians?

A. Yes.

Q. Who were the physicians who were called in consultation?

A. Dr. Baner and Dr. Helmuth.

(Defendant's counsel offered to show that at the time of this illness in 1876, when this consultation was had, Mr. Orton, by the judgment of these consulting physicians, was suffering from congestion of the liver.

Plaintiff's counsel objected.)

90 The COURT: I cannot see that the evidence is admissible. I cannot see that the offer varies the general rule I have laid down.

(Defendant's counsel duly excepted.)

Q. At the time of the consultation which you stated, did the associate consulting physicians see Mr. Orton?

A. Yes.

Q. Was there a consultation between you in regard to the nature of the disease under which Mr. Orton was then suffering?

A. Yes, sir.

Q. Was your judgment concurrent in regard to its character?

A. I cannot answer that certainly; we agreed on a prescription.

Q. Is the sense of that answer that you agreed upon what would be good for the sick man?

A. Yes, sir.

Q. But did not agree as to what was the matter with him?

A. You can draw your own inference from that; I don't know what their private opinions on the nature of the disease were, but I know we agreed on what his condition at that time called for;

91 that is what I mean by agreeing upon a prescription.

Q. Did you not agree upon the nature or character of the disease with which he was then afflicted?

A. I cannot say that we did.

Q. Can you say that there was any disagreement between you on that subject?

A. No; I cannot say that.

Q. What was the nature of the disease under which Mr. Orton was then suffering?

(Objected to by plaintiff's counsel. Objection sustained. Defendant's counsel duly excepted.)

Q. At this time in 1876 was Mr. Orton suffering under the same disease for which you attended him in 1875?

(Objected to by plaintiff's counsel.)

Q. You acquired your knowledge from professional attendance upon him?

A. I did.

(Objection sustained. Defendant's counsel duly excepted.)

Q. When next did you attend, if at all, Mr. Orton?

A. I prescribed for him next in 1877.

Q. What time in 1877.

A. October.

92 Q. How long did you attend him during that illness in October, 1877?

A. Two days.

Q. Did you not during that illness make four visits to Mr. Orton upon three successive days?

A. No; I made three visits on two consecutive days.

Q. You made two visits on two consecutive days?

A. No; two visits the first day and one the next day.

Q. He was the president of the Western Union Telegraph company then?

A. Yes, sir.

Q. Did you observe that these attacks in the fall of the year followed the annual election of that company?

A. I don't know the exact time of the annual election, but I know he was sick about the same time in October—about the middle of October; I only think or believe that the annual election was in October; I have no positive knowledge.

Q. Do you know of Mr. Orton at any time having an attack of the piles?

(Objected to by plaintiff's counsel.)

Mr. PECKHAM: I shall have to ask the witness whether he

93 can answer the question aside from professional attendance upon Mr. Orton, outside of the relation of physician and patient.

The WITNESS: I cannot.

(Objection insisted on by plaintiff's counsel, sustained, and defendant's counsel duly excepted.)

Cross-examined by plaintiff's counsel:

Q. Is there any disease known among physicians under the classification of affection of the liver?

A. Yes, sir; lots of them.

Q. Lots of diseases?

A. Yes, sir; classified as that.

Q. As an affection of the liver?

A. Yes.

Q. Is there any one disease known as an affection of the liver; is that the term used to classify any particular disease?

A. Yes, sir.

Q. What?

A. Some chronic diseases of the liver.

Q. It means some chronic disease?

A. That is what I would take it to mean.

Q. Any particular chronic disease?

A. No, sir.

94 Q. I assume your answer, then, is rather descriptive of what would be meant by an affection of the liver?

A. Yes, sir; it is a big bag to put a good many diseases in.

Q. Is it a medical term?

A. Not strictly; no, sir.

Q. All chronic diseases have some name?

A. Yes, sir; a medical man would give it some name.

Q. This term "affection of the liver" you would use as a generic term applied to chronic diseases of the liver?

A. Yes, sir.

Re-direct examination:

Q. Would not the term "affection of the liver" cover acute as well as chronic disease?

A. It is a general term.

Q. I am not speaking now about medical terminology or medical description of books; I ask you whether the term "affection of the liver" would not cover acute as well as chronic diseases?

A. Yes, I think it would; it would cover anything in the world the matter with the liver.

Q. Is a congestive chill a premonition of any particular

95 disease?

A. No, sir.

Q. It may arise from the engorgement of any organ?

A. Yes, sir.

Q. A congested liver is an affection of the liver, is it not?

A. Certainly.

Q. What is the nature of malarial fever; what portion of the system, or the whole of it, does it affect?

A. It affects the whole system, from the toe nails to the hair of your head.

Q. Is that a common disease?

A. It is of late years; yes.

Q. Is it a dangerous disease?

A. Not usually considered dangerous; no, sir.

Q. Is it not, in very many cases, protracted and tenacious and fatal?

A. Not of itself.

Q. Does it lead to anything dangerous?

A. It produces complications in other diseases.

Q. Do not persons contracting malarial fever frequently die from that cause?

A. I suppose so; yes, sir.

Q. Isn't it very difficult to cure?

A. No, sir.

96 Q. Don't you find it troublesome to eradicate from the system?

A. No, sir, not particularly.

Q. Doesn't an attack of malarial fever, when relieved temporarily, often recur at subsequent times and in subsequent years?

A. They may in subsequent years get new attacks of it.

Q. No; I mean from the germs of the original fever?

A. I don't believe it.

Q. Are you in concurrence with medical authority on that point?

A. I am in concurrence with some and in opposition to others; I am in concurrence with my own practice, my own experience.

Q. There is a diversity of opinion on that subject?

A. Oh, yes; great.

Q. Does malarial fever ever especially attack the brain and produce derangement there?

A. No, sir; not that I know of, not particularly; no, sir.

Q. Does it sometimes cause severe pain and headaches in the brain?

A. It often does that; yes, sir.

97 Q. Isn't that a uniform accompaniment of the disease?

A. It is a common accompaniment, not uniform.

Q. Does this disease of malarial fever ever attack especially and more severely any particular organ of the system?

A. Yes, sir; a long continuance of an attack of malarial fever does.

Q. Successive attacks?

A. Successive attacks and a long continued attack and a badly treated attack.

Q. What complication of diseases do these attacks, successive and severe, of malarial fever commonly or ordinarily terminate in?

A. The most common organ that is attacked is the spleen, producing what is called an "agne cake."

Q. That is a mysterious name; I would like to know what it is?

A. It is a common name. Physicians would call it enlargement of the spleen.

Q. "Cake" is used in a special sense?

A. Yes, sir.

Q. What would you think of an attack of malarial fever accompanied by cerebral engorgement?

A. I should think a man was pretty sick.

98 Q. Dangerous?

A. Dangerous unless he could get relief.

Q. Would such a condition of things be accompanied also by pain in the head—headache?

A. It would be likely to be—yes; all I have ever seen have been.

Q. Please explain what you mean by the term "cerebral engorgement."

A. Rush of blood to the head would be a frequent term, which you often have in headache, and at least fifty per cent. of cases of chills and fever have cerebral engorgement. It is a rare case when they do not have headache.

Counsel for the defendant then called as a witness WILLIAM J. BANER, who, being duly sworn, testified as follows:

By defendant's counsel:

Q. You are a practicing physician and surgeon?

A. Practicing physician.

Q. For many years?

A. Yes, sir.

Q. Where recently have you conducted your practice?

A. New York city.

99 Q. You knew Mr. William Orton?

A. Yes.

Q. You are the gentleman who signed the certificate of death?

A. Yes, sir.

Q. How long have you known Mr. Orton?

A. From 1870 until his death.

Q. Did you attend Mr. Orton for illness?

A. I occasionally prescribed for him; yes.

Q. When was your first attendance?

A. In 1872.

Q. When next?

A. If you will allow me to refer to a little memorandum, I will tell you exactly.

Q. Certainly; please state the time in 1870, if you can?

A. In 1870 I did not prescribe for him at all. My first attendance was in 1872.

Q. What time in 1872?

A. I have not the dates in the month.

Q. The month will do.

A. My first two prescriptions were in January, one in February, and three in September and three in December of 1872. I do not remember the period in the month.

Q. Please state when your next attendance upon him was?

100 A. It was in January, 1873, when it seems he came himself to my office during the month of January four times.

Q. Please proceed in the order of date.

A. In the month of March I prescribed for him five times at his house. In the month of November I prescribed for him once at his house. In 1874 I prescribed for him seventeen times in the month of March, and in the month of August once. That is all during those two months in the year 1874.

Q. Do you remember of his traveling to Europe?

A. Yes; in the year 1874. I advised him to go to Europe, and it was during my visits in March that I gave him that advice.

Q. Did he sail in March?

A. I do not remember.

Q. He sailed about that time?

A. Yes, sir.

Q. Do you know long he was absent?

A. No; I do not remember.

Q. Do you know whether during his absence he consulted Dr. Bayse of London?

A. I don't know anything about that.

Q. I don't mean personally but from any declarations of his?

A. I do not know personally, but he told me, I believe, that he did.

101 (Answer objected to by plaintiff's counsel.)

Mr. BEACH: I propose to prove that Mr. Orton informed the witness that he had consulted Dr. Bayse in London.

(Objection sustained. Defendant's counsel duly excepted.)

Q. Now in 1875?

A. I prescribed for him once in August. That was the only prescription I made for him in 1875.

Q. In 1876?

A. In the month of February I prescribed for him three times; in the month of March nine times; in the month of October, at Irvington, three times. I was a part of the medical attendance at Irvington in October, 1876. I assisted at a prescription three times. I met Dr. Hasbrouck in consultation.

Q. In October, 1876, how long was he ill?

A. I don't remember how long. I saw him three times during a period of about six days, and I had not seen him before.

Q. During the time that Dr. Hasbrouck had charge of this case?

A. Yes, sir.

Q. Do you know of his removing to New York after that illness in October?

102 A. I do not, sir.

Q. During that fall, after that illness, did you see him in New York?

A. I did not.

Q. Did you meet him socially?

A. I did not. Oh, I met him at the Union league club occasionally, and shook hands with him, perhaps. I presume that would be called socially.

Mr. BEACH: I wish formally to raise the same question here.

Q. During these several attacks of which you have spoken, what was the nature of the disease to which he was subject?

(Objected to by plaintiff's counsel.)

The COURT: I make the same ruling as before, that if your knowledge or information was acquired by you in your character as physician for the purpose of medically treating him, the evidence is inadmissible.

The WITNESS: I know nothing except what I got professionally from them.

(Objection sustained. Defendant's counsel duly excepted.)

Q. Have you not met Mr. Orton at the Union league club?

A. Yes, sir.

Q. While there did you ever notice that he was suffering

103 under headache?

A. I remember nothing particularly of that kind.

Counsel for the defendant then called as a witness WILLIAM TOD HELMUTH, who, being duly sworn, testified as follows:

By defendant's counsel:

Q. You are a practicing physician in this city?

A. I am.

Q. How long have you been in practice?

A. Between 26 and 27 years.

Q. Did you know Mr. William Orton?

A. I did.

Q. Socially as well as professionally?

A. I did.

Q. Did you, at any time, attend him professionally, and if so, when?

A. I did. He consulted me once at my office, and I paid him one visit two years afterwards at Irvington. It was about two years afterwards; I cannot give you the date of the office prescription.

Q. Was that the occasion spoken of by Dr. Baner when you were in consultation?

A. The visit of consultation was—yes, sir.

Q. Those are the only occasions?

104 A. The only occasions.

Q. There was a consultation there between you three gentlemen, professionally?

A. There was.

Q. Did you agree upon the nature of the disease?

A. I believe we did; as much as doctors generally do in consultations.

Q. What was the nature of the disease under which Mr. Orton was then suffering?

(Objected to by plaintiff's counsel. Excluded. Defendant's counsel duly excepted.)

Q. Will you please state what was the nature and extent of your social intercourse with Mr. Orton?

A. It was not much. He was the president of a hospital with which I was connected, and his family and mine exchanged visits, and I have met him at hospital meetings, more in a business capacity than any other. The intercourse between us was not very close. I merely met him socially occasionally as I would any other gentleman, without any special friendship.

Q. What produces cerebral apoplexy?

A. There are several conditions that produce it. There can be cerebral apoplexy produced by nervous exhaustion; by cer-
105 tain conditions of plethora; by certain conditions of unequal circulation, brought about by a sudden shock; congestion of the liver, and a good many varieties. I am speaking of cerebral apoplexy in the general definition of the term; by that I mean an abnormal fullness of blood in the vessels of the brain.

Q. Does exhaustion from overwork sometimes produce it?

A. Yes.

Q. What is your judgment as to the severity and danger of ordinary attacks of malarial fever?

A. They are not dangerous, but they are extremely tedious.

Q. Do repeated and protracted attacks of that character frequently result fatally?

A. They produce other diseases which do, especially if there is a predisposition to any disease.

Q. Would they be likely to affect the brain?

A. Very likely, if there is a disposition that way on the part of the patient.

Q. Are repetitions of the attack more dangerous?

A. Yes.

Q. Is any disturbance or affection of the brain likely to
106 produce a determination of blood to that organ?

A. Not all; there are occasions when there is a decrease of the amount of blood that goes to it; there can be an analine condition as well as a plethoric condition.

Q. Are disturbances of the brain, as an ordinary rule, likely to produce an affection of the spleen?

A. No, sir, not often.

Q. A determination of blood to the head?

A. Yes; there is a great deal of difference between a determination of blood to the head and affection of the spleen.

Q. What would be the effect of these repeated malarial attacks, which we have referred to, in the case of a patient who was severely diligent in his application to business and to intellectual exertion?

A. They would be likely to cause congestion; not necessarily to the brain, however.

Q. Congestion of what?

A. Of some internal organ which was previously weakened or predisposed to congestion; sometimes the liver, sometimes the lungs, sometimes the spleen, sometimes the brain.

Q. From your observation of Mr. Orton in business and
107 social departments, please state what his temperament was.

A. I scarcely saw enough of him to say; I only saw him occasionally; it was a bilious-nervous temperament, probably.

Q. In the relations of which you have spoken, did you know him to complain of headaches?

A. No, sir.

Counsel for the defendant then read in evidence the deposition of Mrs. Agnes J. Orton, taken before trial before a notary public upon stipulation between the parties, the questions and answers in the deposition being taken subject to all legal objections as to competency and materiality at the trial.

AGNES J. ORTON, being duly sworn, testified as follows:

Question. Mrs. Orton, where do you reside?

Answer. At Irvington, New York.

Q. You are the widow of Mr. Orton, on a policy on whose life this action is brought?

A. I am.

Q. Mr. Orton died when?

A. 22d April, 1878.

108 Q. Where did he reside at the time of his death?

A. 413 West 23d street, New York.

Q. When were you married?

A. In 1850.

Q. At the time of Mr. Orton's death he was president of the Western Union Telegraph company, was he not?

A. He was, and for twelve years before.

Q. Do you remember any illness that attacked him in the fall of 1877?

A. He was sick only one day.

Q. Where?

A. At Irvington.

Q. You have no knowledge of that illness?

A. I only knew he had been sick when I returned.

Q. Had you any conversation with him in reference to that illness?

A. When I came home he said he had been sick a day.

Q. Did he go to town the day he was ill?

A. I was in Boston.

Q. Did he say what the matter was?

A. I do not remember whether he did or not.

Q. Do you remember any illness that attacked him between that time and the fall previous, 1876?

109 A. He had been uncommonly well during that time.

Q. Was he ill at all in 1876?

A. He was sick in that year.

Q. Where?

A. At Irvington.

Q. How long was he ill?

A. I have no idea.

Q. Can you not give me some idea how long that illness was; was it a month?

A. He did not go to his office for nearly a month.

Q. During that time he was home, was he not?

A. Yes.

Q. How long was he confined to his bed at that time?

A. He was a week in bed.

Q. What was the difficulty at that time?

A. Some trouble with the liver.

Q. You were in constant attendance on him during that time?

A. Yes.

Q. Was it what is called congestion of the liver?

A. Yes.

Q. He knew that fact, did he not?

A. I do not know whether he did or not.

Q. Did you hear the subject of his disease talked about in

110 his presence?

A. No; physicians generally talked about these matters.

Q. Did they talk in the presence of Mr. Orton about it?

A. I do not remember.

Q. Did they make any examination of his liver?

A. Not that I know of.

Q. Did they in his presence prescribe any remedy for the difficulty with the liver?

A. They gave medicines.

Q. Did you administer to him his medicines at any time, and what were they?

A. I do not know.

Q. Did you not understand from your husband that he was informed of the nature of the disease under which he was suffering?

A. My husband had studied medicine and knew as much as most physicians do.

Q. Did you not understand from your husband the nature of the disease?

(Plaintiff's counsel objected to the question; excluded; defendant's counsel duly excepted.)

Q. Did he talk about his disease?

A. Mr. Orton was a very reticent man; I think he knew
111 himself what the trouble was.

Q. Who was the physician or physicians, if more than one, who attended him?

A. Dr. Hasbrouck of Dobbs' Ferry.

Q. Who else?

A. Dr. Baner of New York.

Q. During that illness was there one or more consultations at Irvington?

A. Dr. Baner came once.

Q. Did any other physician visit him during that illness?

A. Not that I remember.

Q. During that illness did he appear to suffer much pain; when he did, in what locality; was it in the liver?

A. Yes; and the pain lasted only a few hours.

Q. Was there more than one occasion of such paroxysm?

A. I do not remember.

Q. Had he no suffering generally?

A. No.

Q. Did he during that illness have any chills and fever?

A. No.

Q. Was Dr. Helmuth there?

A. I do not remember.

Q. Was he the New York physician?

112 A. Yes; and only came when sent for.

Q. Prior to his death Mr. Orton suffered a good deal with his head, did he not?

A. Not during the last year.

Q. Prior to that time did he suffer any?

A. Not more than any person that overworked.

Q. When, if at any time, were these attacks of headache most frequent in reference to his business; did they usually occur immediately after the election contests in his telegraph company?

A. No; after election time he always took a day of rest, because there was nothing to do when the books were closed.

Q. Do you remember whether attacks of headache usually followed these periods?

A. I think they did?

Q. Please describe those headaches.

A. I can't; there were like those any one has who goes without their dinner; they were not long; he laid down and took a cup of tea.

Q. Did he take anything else?

A. He took a little charcoal?

Q. Did his face become florid, flushed?

A. No, sir.

113 Q. Did you ever see him holding his head in his hands and complaining of his headache?

A. No, sir; never; not for headache.

Q. For what?

A. When he had something on his mind and was thinking.

Q. Was a physician ever called when he had a headache?

A. No, sir.

Q. You knew of no medical prescription given him for headache?

A. No, sir, to my knowledge.

Q. Did you hear any physician speak to him about them?

A. They told him he worked too hard.

Q. Who told him?

A. Everybody told him so.

Q. When was it?

A. It had been all his life.

Q. How was it within a year or two of his death?

A. Not frequent within that time.

Q. Within a year prior to his death did you hear him cautioned at all as to overworking, Mrs. Orton?

A. Yes.

Q. More than once?

A. I don't know.

114 Q. Wasn't it a fact that he was frequently cautioned by physicians and friends within two years prior to his death with respect to overwork and in connection with those headaches; isn't that a fact?

A. Last year——

Q. Say yes or no.

A. Last year it was; there were some lawsuits pending.

Q. Those were lawsuits with reference to the Western Union?

A. Yes.

Q. In which he was very much interested?

A. Yes, sir.

Q. Do you remember an occasion of his visit to Washington and an illness that succeeded that?

A. No, sir; I do not.

Q. For a year previous to his death, or while you were residing at Irvington, he was in the habit of coming home every night?

A. Yes, sir.

Q. Coming to New York in the morning to his business?

A. Yes, sir.

115 Q. And what was his condition on his return; was he usually very much fatigued?

A. It depended on the weather.

Q. And in what weather was he most fatigued—in warm or cool?

A. In warm.

Q. How did he indicate the fact of his fatigue; did he mention

it, or was there anything in his personal appearance that indicated fatigue to you?

A. By his appearance.

Q. Did he lie down before dinner, or did he complain that he was very tired?

A. His head oppressed him.

Q. Was there nothing about his personal appearance?

A. Yes; heaviness about the eyes.

Q. That was not the fact during the winter immediately previous to his death?

A. No.

Q. Do you mean to say that during that winter, and up to April in that year, there were no indications of fatigue when he returned, so far as you could observe?

A. He lived in Irvington in summer and in New York in winter.

Q. You returned——

A. The first of November.

Q. To New York the first of November?

116 A. Yes.

Q. When did you go to Irvington?

A. In May.

Q. In May?

A. Yes; the first of May; in May, or about that time.

Q. He died in——

A. He died in New York.

Q. Before you returned there?

A. Yes.

Q. During a year or two prior to *to* his death was he disturbed in his sleep at all, Mrs. Orton; was he wakeful, or did he sleep well?

A. He slept better.

Q. He slept better; was he wakeful at all; did he complain of sleeplessness?

A. No.

Q. Was he restless or fretful at night?

A. No.

Q. Was he two years before his death; I don't refer to any particular date, but within two years of his death?

A. He slept better, but I can't answer more than that.

Q. Better than what?

A. The business has some influence—it keeps them awake; Mr. Orton's business troubled him less.

Q. He formerly had been——

117 A. He never had been a very heavy sleeper.

Q. He had some difficulty in resting at night formerly; is that a fact?

A. He used to be more troubled, but in late years he had not been.

Q. You have said, Mrs. Orton, that he was less wakeful—substantially that—during the——

A. Substantially that during the latter years of his life.

Q. I understand from that that at some time in his life he was wakeful at night; that is so, is it not?

A. Yes.

Q. Was it a year, or two, or three?

A. I could not locate that; as he recovered his business troubled him less.

Q. Less and less?

A. Yes

Q. During any time had he called Dr. Baner to attend him or to prescribe for him by reason of his wakefulness?

A. Once.

Q. Do you remember more than once?

A. No.

Q. About how long ago was that?

A. How long before his death? I could not tell you.

118 Q. You could not tell whether it was within one year, two, or three?

A. I could not.

Q. Was it within two years, to the best of your recollection I mean?

A. It was before that.

Q. It was before two years?

A. Yes.

Q. How much before two years?

A. I cannot tell you; it was within two years.

Q. It was within less than two years?

A. It was less than two years; I don't mean less than two years; I mean longer than two years.

Q. Was it less than three years, to the best of your recollection? That would bring it to 1874.

A. I think it was about that.

Q. It was about 1874; you and he went to Europe at one time, did you not, Mrs. Orton?

A. Yes, sir.

Q. In the year 1874?

A. Yes.

Q. Did you go oftener than once?

A. Only once.

Q. And for what purpose did you go to Europe at that time, or did Mr. Orton go to Europe, I mean?

A. Business and recreation.

119 Q. Did he go by the advice of physicians?

A. Yes.

Q. For what was he advised by physicians to go to Europe?

A. To take rest.

Q. Was there any particular ailment or difficulty for which he was advised to take rest that you know of?

A. He got overworked.

Q. It was because he was overworked?
A. I think so.
Q. Had his head troubles anything to do with it?
A. Yes, sir.
Q. And how long were you gone, Mrs. Orton, about?
A. Two months.
Q. And while abroad he perceptibly improved?
A. Yes, sir.
Q. And came back apparently very much improved?
A. Yes, sir.
Q. And while in London did he consult Dr. Bayse, or did Dr. Bayse see him and have any conversations with him in reference to his health?
A. Dr. Bayse was called by me.
Q. And he saw Mr. Orton?
A. Yes, sir.
Q. Mr. Orton talked about his health?
120 A. Yes; I think so.
Q. Dr. Bayse made some remarks with reference to his health also; did he not tell him what he ought to do?
A. Yes, sir.
Q. How he ought to conduct himself?
A. Yes, sir.
Q. What did he tell him he ought to do?
A. Take more exercise.
Q. Did you, in Mr. Orton's presence, or did Mr. Orton, say anything to Dr. Bayse about his head?
A. I did not hear him.
Q. Do you know whether he did or not?
A. Yes; I think.
Q. Why don't you say so if you know it; did you hear or know of Dr. Bayse telling Mr. Orton that he had; did you hear or know of Dr. Bayse illustrating to Mr. Orton the condition of his head by mentioning that the veins or arteries were engorged with blood, such as people suffer with who had varicose veins?
A. I don't know.
Q. Do you remember Dr. Bayse giving him any advice farther than that you have stated to take more exercise?
121 A. No, sir.
Q. Did he say anything to the effect that he must do less work?
A. I did not hear.
Q. And take more recreation?
A. I did not hear it; I don't know.
Q. Did Mr. Orton say to you that the Dr. had said so to him?
A. No, sir.
Q. In reference to the illness in the fall of 1876, was not it the fact, Mrs. Orton, that Mr. Orton was ill from the 19th of October

to the 13th of November, when he removed to New York for the winter?

A. Yes.

Q. How long was he ill in New York before he went to business that fall?

A. I don't know.

Q. As near as you can; was it a week or ten days after you came back to New York?

A. He did business; I can't remember dates.

Q. I am asking about his going to his office.

A. He went soon after, but not to stay all day.

Q. You can't give the time when he began to go regularly back to his business?

122 A. No, sir.

Q. But it was some little time—some few days?

A. Yes, sir.

Q. In the fall of 1877 you have mentioned an illness of a single day after you return; did a physician call on him?

A. Yes, sir.

Q. Prior to the single day's illness did a physician call on him?

A. I was in Boston; I don't know.

Q. How long had you been in Boston?

A. Ten days.

(Defendant's counsel then read the cross-examination.)

By Mr. PECKHAM:

Q. At the time of the illness in 1876 you think, you say, you know that Mr. Orton knew what was the matter with him; the time of the congestion of the liver?

A. I think he did.

Q. You said you inferred that he knew what was the matter with him?

A. Because he knew so much about physiology. If he went to see a sick person he could tell, as well as the doctor, what was the matter.

123 Q. Had you any other reason for saying that he knew what was the matter with him?

A. No, sir; no more than that.

Q. Those headaches of which you speak, how long did they last?

A. Only very short. In the morning he would wake with a feeling that he was going to have a headache. I would get up and get a cup of tea and some charcoal for him.

Q. Mr. Orton had been a pretty hard-working man all his life?

A. Yes, sir; he commenced so and broke down. He always worked hard.

Q. He had always been more or less advised not to work so hard?

A. Yes, sir.

Q. You did not know that he consulted any physicians about his headaches?

Mr. BEACH: Once, she said.

Q. I understood you to say you didn't know of his consulting a physician at any time about those headaches; but Mr. Beach said that you said you thought you knew once?

A. Yes, sir.

Mr. BROWN: That was Dr. Baner.

Q. When was that?

124 A. Before he went to Europe.

Q. How long before you went to Europe?

A. About a month.

Q. Did Mr. Orton transact some business in Europe?

A. Yes, sir; he did; some very important business; he was doing business constantly during all the time in London and Paris.

Q. Business for the telegraph companies?

A. Business for the telegraph companies.

Q. You were asked about saying something to Dr. Bayse in London about his head. You said you did not hear him saying, but that it had left an inference. What did you know?

A. Dr. Bayse was attending me, and I was very sick.

Q. Did you say you knew that he called on Dr. Bayse from anything he said or did?

A. No, sir; they talked together in a very friendly way.

Q. They talked together in a friendly way?

A. Yes, sir; visibly friendly.

Q. Dr. Bayse knew what his position and occupation were?

A. Yes, sir; they were intimate friends.

Q. Did Dr. Bayse reside in London?

125 A. Yes, sir.

Q. How long had Mr. Orton known him?

A. That I don't know, sir.

Q. He had known him before he went to London?

A. Not before I went, but he met him.

Q. He had met him where?

A. He met him with other parties that sent him to him.

Q. He met him with other parties on other matters?

A. Yes, sir.

Q. Was his being called in to attend you or not his first acquaintance with Dr. Bayse?

A. No, sir.

Q. When you say you have heard Mr. Orton cautioned more or less about working too hard, and not working too hard, and so forth, what impression do you mean to convey with respect to that question?

A. His hours were so long.

Q. Well, when Mr. Orton had any headache from fatigue, was it relieved by his ceasing to work so hard?

A. Yes, sir, in a short time; he would go to his dinner in an hour's time.

126 Re-direct examination:

Q. Was Mr. Orton in the habit of attending public or social dinners frequently, Mrs. Orton?

A. Yes, sir; constantly; every night nearly.

Q. Almost every night; what do you mean by his long hours; you speak of his hours being very long; what time did he usually go to his business in the morning?

A. He was in his office before any of his employees.

Q. At about what o'clock did he leave home in the morning when at home?

A. Shortly after eight o'clock.

Q. When in the country?

A. Before that.

Q. He would leave on the eight o'clock train?

A. Yes.

Q. What time did he usually return home from his business at night?

A. In the winter it was seven o'clock; in the summer he was obliged to come when the train came.

Q. Generally a little earlier or later?

A. Earlier.

127 Re-cross-examination:

Q. Mr. Orton, you said, was frequently in the habit of going out to dinner; didn't he frequently, in coming back from dinner, go to work?

A. Yes, sir; his best efforts were done after that; at three o'clock his best efforts were done; he came home from dinner and worked.

Re-direct examination:

Q. He very frequently worked until three o'clock in the morning?

A. Yes, sir.

The WITNESS: I have read over the foregoing testimony as written out by the stenographer, and I wish to make this correction:

On page 9, in answer to the question "Did he lie down before dinner, or did he complain that he was very tired?" I stated, "The heat oppressed him" instead of "His head oppressed him."

Before the cause was submitted to the jury and before the judge delivered his charge to the jury, defendant's counsel requested the court to charge the jury as follows:

128 I. If the jury believes on the evidence that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance, the policy is void and the defendant is entitled to a verdict.

The court refused so to charge, except as charged.

II. If the jury believes on the evidence that the insured ever had had any other illness, local disease or personal injury, than those admitted by him in the application, to wit, colic for one day, fistula, and fever and ague, the policy is void, and the defendant is entitled to a verdict.

The court refused so to charge, except as charged.

III. If the jury believes on the evidence that the answer to the seventh question in the application, to the effect that the insured had never had affection of the liver, or that the answer to the eighth question, to the effect that he had not had
129 any other illness, local disease or personal injury, except colic for one day in October, 1877, was in fact untrue, it is immaterial whether the answers were made in good faith or whether the representations were material, the policy is void, and the defendant is entitled to a verdict.

The court refused so to charge, except as charged.

IV. That the illness in October, 1876, was a fact relating to the physical condition and personal history of the insured, which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant entitled to a verdict.

The court refused so to charge.

V. That the illness in 1875 was a fact relating to the physical condition and personal history of the insured, which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made
130 acquainted, and for failure to disclose such fact the policy is void and the defendant entitled to a verdict.

The court refused so to charge.

VI. That the trip to Europe, by advice of Dr. Baner, in 1874, was a fact relating to the physical condition and personal history of the insured, which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge.

VII. The suffering of several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, if it occurred prior to the making of the application, was a fact relating to the physical condition and personal history of the insured, which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact
131 the policy is void and the defendant is entitled to a verdict.

The court refused so to charge.

VIII. If the court refuses to charge the propositions marked IV, V, VI and VII, then that it charge:

That if the jury believe on the evidence of the trip to Europe, by advice of Dr. Baner, the illness in 1875, the illness in 1876, or the suffering of several attacks of malarial fever accompanied by cerebral engorgement, if it occurred prior to the application, or either of them, was a fact relating to the physical condition, personal or family history or habits of the insured, with which the officers of the defendant ought to have been made acquainted; the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to a verdict.

The court refused so to charge, but in his general charge to the jury he charged the proposition with a modification.

The court charged the jury as follows:

132 Gentlemen of the jury: On February 21, 1878, the defendant insured the life of William Orton for the term of his life, in the sum of $5,000, said sum to be paid to the plaintiff in trust for the surviving children of the said Orton. The premium which was due upon the execution and delivery of the policy was paid. The insured died the 22nd of April, 1878.

The case stated by the plaintiff in his complaint is admitted; but the defendant, taking the burden of proof and the affirmative, sets up that the policy was and is null and void by reason of the violation, prior to the issuing of the policy, of an express condition and agreement upon which the policy was issued and accepted by the assured. This express condition and agreement is in the following words:

"This policy is issued and accepted upon the following express conditions and agreements:

1. That the answers, statements, representations, and declarations contained in or endorsed upon the application for this
133 insurance, which application is hereby referred to and made a part of this contract, are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, then this policy shall be absolutely null and void."

The plaintiff has warranted the truth in all respects of each and every answer, statement, representation and declaration which is contained in the application, and the application is made part of the policy. By the terms of the policy the truth of each answer is made an express condition to the existence of liability on the part of the company. The untruthfulness of an answer, although the answer was made in good faith and with a belief in its truth, avoids the policy, and the materiality of question or answer to the risk is not important or essential. The materiality of the statements is removed from the consideration of the court or jury by the agreement of the parties that such statements are true in all respects, and that, if untrue, the policy shall be void. The question at issue is whether the warranty was in fact broken, and if, in fact, the

answer or statement was untrue, the condition upon which
134 the policy was issued is broken and the contract is at an end.

I shall call attention hereafter to the fact of any alleged fraud, misrepresentation or concealment.

As I have said, the defendant takes the burden of proof, and must satisfy you by a fair preponderance of evidence that Mr. Orton did answer one of the questions which were put to him, and which he undertook to answer, untruly in fact—not with a willful or intentional disregard of truth, but in fact incorrectly or untruly; and I may here remark in passing, as something has been said by counsel, that you are to consider this case just as you consider all other cases, without reference to parties, and the evidence which calls upon you and the evidence which shall compel you to find for the plaintiff or for the defendant should be of the same weight which would compel you to find for plaintiff or defendant in every other case. In other words, it is not a matter of any importance whether one of the parties is a corporation and the other substantial party is a child or children or not. Parties come before
135 you just alike. Of course these questions and answers are to be construed fairly. A strained and unnatural construction and interpretation is not to be given them either in favor of or against the defendant. It is the duty of the applicant to answer fairly the questions that are put, to give the information which is apparently called for, and the company is not to put a construction upon the answers beyond and outside of their natural meaning. For example, it is not probably the proper construction that a man of mature years should be called upon to recount his infantile ailments, to go back to the period of his infancy. That is not the natural construction which would be put upon it.

Now to come to the particular points in the case. The first question upon which it is claimed that an incorrect answer was given is the seventh question. The material parts of the seventh question are as follows: "Have you ever had any of the following diseases? Answer yes or no." And among the diseases is "affection of the liver," to which Mr. Orton replied "No." I pass by the habitual headache, as that has not been commented on.
136 In the first place, what is meant by the question "Have you had any of the following diseases?" Among the diseases mentioned are pneumonia, diphtheria, pleurisy, scarlet fever, affection of the liver. A disease is more than a slight illness, more than what is sometimes called an "ill turn." It is more than a mere temporary derangement of the functions of some organ. It is a substantial attack of illness of the character and nature named. We know what is meant by the term that a person has had pneumonia or pleurisy. It is not meant an illness which, if prolonged, would end in pneumonia or pleurisy. It is not meant that he had symptoms of pneumonia or pleurisy, or of some lung difficulty; but it is meant that he had an illness which amounted to an attack of such

marked and serious character and symptoms that the disease was well defined.

Now an affection of the liver is not a medical term, but it means a disease, a malady of the liver, not some temporary disorder or derangement of the functions of the liver, but a well-defined
137 ailment having some bearing on the general health of the person.

The defendant says that in October, 1876, Mr. Orton was ill for about a month; that Dr. Hasbrouck attended him constantly; that he was indoors for that time, and in bed about a week; that Drs. Baner and Helmuth were called from New York in consultation, and therefore that it is fair to infer that the illness was of a serious and substantial and somewhat dangerous character; and that Mrs. Orton says that her husband had at this time some trouble with the liver, or another expression used is "congestion of the liver;" and so the defendant says that when an active, energetic man of extensive business and large trusts is confined to his bed for a week and to his house for a month, and summons two physicians from the city in consultation, his illness is of no slight or inconsiderable character, but has become a disease; and when his wife says it was some trouble or congestion of the liver, in response to a question in a deposition taken adversely to the interests of her children, you may fairly and properly infer that
138 he had a disease of the liver.

The plaintiff says the defendant must prove his case; the physicians have said nothing of the disease; they have said nothing from which you could guess whether the difficulty was in the liver or not. Mrs. Orton has said simply that he had some trouble with the liver; there was congestion of the liver. Whether that was her husband's main and chief difficulty at this time, or was incidental, you cannot tell or know.

Now, there are the two positions of the plaintiff and the defendant, and I have stated them as fairly as I could, and I think I have stated them as strongly as I could. It is for you to determine what that man had in October, 1876, and whether what he had amounted to a disease.

Another of the questions is: "State the number of attacks, character and duration of all the diseases which you have had?" The answer is: "Had fistula in 1871, induced by intermittent fever; radically cured." This question refers to diseases theretofore mentioned, and to any others which the applicant had.

139 The defendant says this attack in 1876 of four weeks was of the length and must have been sufficiently severe to have been called a disease; otherwise Mr. Orton would not have remained in his house. The plaintiff says there is no substantial proof which can justify you in finding, as a fact, that he had a disease at this time. In other words, in regard to this branch of the question, the same arguments and the same suggestions precisely

are made which are made in regard to the first branch of the question, and upon which I have already commented.

We come now to the eighth question: "Have you had any other illness, local disease or personal injury; and if so, of what nature, how long since, and what effect on general health?" To which the answer is: "Had colic for one day, October, 1877; no recurrence. General health good." Now the question: "Have you had any *illness?*" Illness is a word which may include, properly, an attack of a less grave and serious character than a disease. An illness may be slight or severe. In either case it is an illness.

140 Now the question is: "Have you had any other illness than those mentioned in the seventh interrogatory; and if so, of what nature, how long since, and what was its effect on your general health?" Mr. Orton confined himself in his answer to the term of colic which he had in October, 1877, and properly said there was no recurrence, and, as I presume, also properly said that his general health was good, probably meaning that its effect upon his general health was not deleterious.

Now, the defendants in this part of the case place their strength upon that attack in October, 1876, of a month, of which I have already spoken; and they say if that did not amount to a disease it was an illness, and an illness which a person of Mr. Orton's habits of life could not fail to remember. Whether he did remember or not it is immaterial. It was an illness, and they present to you the same considerations which I have already presented to you, to wit, its duration, its character, apparently calling for the attendance of physicians in consultation from the city, and the

141 fact that unless it was of some serious moment Mr. Orton's active and energetic habits would have compelled him to leave the house and come to the city and engage in his duties. In reply the plaintiff says:

"Gentlemen, the defendant has got to prove his case, and we are not compelled to introduce affirmative proof on our part until sufficient evidence has been introduced to make a case upon the part of the defendant." And they ask you to assume that there has not been sufficient affirmative evidence to satisfy you—the defendant taking the burden of proof—that this man had what may be called an illness at that time.

The answer to the fourteenth question is next the subject of attack. "How long since you were attended by a physician? For what diseases? By what physician? Give name and residence?" But that has not been commented upon by the counsel for defendant, and therefore I shall pass it by.

The sixteenth question, "Have you reviewed the answers

142 to the above questions, and are you sure they are correct?" was intended to call upon the applicant to review and revise his answers, and to make sure he had answered correctly.

I have thus, gentlemen, gone over the particular questions which are named in this second defense. I come now to the third defense.

The policy is also void if the applicant has obtained it through any concealment; that is to say, if there has been any concealment of material facts called for by the question the policy is void; and if there were any facts in Mr. Orton's physical condition not stated in any one of these answers with which the company should properly be made acquainted, with a view to determine the character of the risk, then it was his duty to state these facts, inasmuch as he was expressly interrogated thereof in the fifteenth question, that question being this: "Is there any fact relating to your physical condition, &c., which has not been stated in the answers to the foregoing questions, and with which the officers of the com-
143 pany ought to be made acquainted?" Upon this point I charge you that, "if you believe, on the evidence, that the trip to Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, or the suffering of several attacks of malarial fever, accompanied by cerebral engorgement, (if those attacks occurred, or either of them,) were facts relating to the physical condition and personal history of the assured of importance to the ascertainment of the condition of his health at the time of the application, the omission of those facts, or either of them, from the application avoids the policy, and the defendant is entitled to recover."

Now we come to the specific items: first, the trip to Europe. Now, gentlemen, advice to a man or to a patient to go abroad, to Europe, may mean a great deal, or it may mean very little. You have known and I have known that advice to be given to our friends when we knew and the patient knew that it was the signal of his death, and that it was probably the last advice which the physician would ever give. We have known, too, of cases
144 where the advice is given, not in a spirit of gravity or as a thing of necessity, but to a hard-worked man: "Go abroad! Take pleasure! Take a rest! Put your business behind you this summer, and go to the other side! I insist upon it!" Now, there is the vital thing in this part of the case. If Mr. Orton was broken down by hard work and the victim of insomnia, a victim of shattered nerves and so on, and was compelled to abandon business and seek rest and recreation, then it is a serious question whether he should have asked a policy of insurance without telling the company of his physical condition; but, gentlemen, if this advice to go abroad was a suggestion not intended to be a grave suggestion, or a serious suggestion, and one which it was vital to the man or important to the man to obey, then, gentlemen, it is not one of those circumstances which was of importance to communicate; but you are the judges of its importance.

I now come to another point and part of the case—of the
145 suffering of the several attacks of malarial fever, accompanied by cerebral engorgement. The two great points in the case on the part of the defendant are the illness in 1876 and the facts, if they be facts, mentioned in the proofs of loss by the physician. In reply to the inquiry, "State the remote cause of death,"

&c., Dr. Baner makes answer: "The fatal attack was preceded by severe and protracted mental work and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement." "Q.—State the immediate cause of death." "A.—Cerebral apoplexy." "Q.—Had the deceased any other disease, acute or chronic, or had he ever had any injury or infirmity?" "A.—I think not." "Q.—Was there anything in his habits or mode of life that predisposed him to disease?" "A.—Nothing but a tendency to overwork."

Now, gentlemen, if it was a fact that Mr. Orton had had, prior to the application, several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, then that would be, in my judgment, a fact for you to consider. I
146 do not say it would be an important fact, for that is for you to determine. My charge was that if the jury believe on the evidence that these facts, if they exist, were facts relating to the physical condition of Mr. Orton of importance to an ascertainment of the condition of his health at the time of his application, then it was a fact that he ought to have communicated to the company, and if he did not the policy was void.

The first question is this: Did these attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, exist? I pass by the question whether, if they existed, they were known to Mr. Orton, because I do not consider that it is material to put that question to you. Of course, if a man has several attacks of malarial fever, he being an intelligent man and a man acquainted with medicine, he knew whether he had them or not. Now, Dr. Baner has given his statement, and has given it upon his medical authority. The plaintiff says that is a mere
147 statement of Dr. Baner; that it was a statement in the first place in regard to which Dr. Baner may have been mistaken. If cross-examination had been made perhaps it would have softened that statement very materially. Upon a statement made out of court, made simply to inform the company that the man was dead, and what, in his opinion, was the predisposing or remote cause of death, it is not competent for you to find as an affirmative fact that those attacks existed. The first question is whether they existed; and in the next place, if they existed, whether their existence was not of importance to an ascertainment of his condition, which ought to have been communicated. If it was of importance to the company to know that those attacks of malarial fever existed, then it was Mr. Orton's duty to have communicated it.

If you find for the defendant—that is, if you find affirmatively for the defendant that Mr. Orton did not answer one of these questions truly,—then there is nothing more for you to
148 do except to find for the defendant. If you find affirmatively that he was guilty of concealment in his answer to the fifteenth question, then you will find for the defendant. If you

do not find for the defendant you will find for the plaintiff, and the amount is $5,767.91.

Mr. PECKHAM: I except to your Honor's statement regarding the fifteenth question. The answer is: "No; nothing to my knowledge," and I suppose the word applies as much to his knowledge that it should be communicated as to his knowledge of the fact.

The COURT: My idea in regard to that matter is this: that if these malarial attacks are proved to have existed, then it is for the jury to determine whether they were of importance to the company to an ascertainment of the physical health of Mr. Orton. If of importance, then they should have been communicated. Being facts which existed, and being of importance, they should have been communicated to the company, although Mr. Orton might not have been of the opinion that they were of im-

149 portance.

Mr. PECKHAM: I except to that.

Defendant's counsel then duly and severally excepted to each of the refusals of the court to charge the several requests to charge submitted to him by the defendant's counsel, and also excepted to the charge of the eighth proposition as modified by the court and embraced in his general charge.

The jury thereupon retired and afterwards brought in a verdict for the plaintiff for the sum of $5,767.91.

And inasmuch as none of the several matters so produced and given in evidence by said defendant, and by its counsel aforesaid excepted to, appear by the record of the verdict aforesaid, the said counsel for the defendant did request the court to sign this bill of exceptions as of the 21st day of January, 1881, the day the said verdict was rendered.

N. SHIPMAN, [L. S.]
*Judge.*

150 We agree to the foregoing bill of exceptions and consent that the same may be settled accordingly and signed by Hon. Nathaniel Shipman, before whom the cause was tried, as of the 21st day of January, 1881, and that the same may be filed on or before the 30th day of April, 1881, *nunc pro tunc* as of said 21st day of January, 1881, pursuant to the order herein, dated March 19, 1881, and entered in the office of the clerk of the circuit court of the United States for the southern district of New York, on the 22nd day of March, 1881, *nunc pro tunc* as of the 21st day of January, 1881.

Dated New York, April 8, 1881.

MILLER & PECKHAM,
*Pl'ff's Att'ys.*

BEACH & BROWN,
*Def't's Att'ys.*

151 GENTLEMEN: Please take notice that the within is a copy of the defendant's bill of exceptions, and that we shall present the same to Hon. Nathaniel Shipman on the 19th day of February, 1881, at his office, Hartford, Ct., and request him to settle and sign the same as of the 21st day of January, 1881.

Dated N. Y., Feb'y 13, 1881.

Yours, &c., BEACH & BROWN,
*Def't's Att'ys.*

To Messrs. MILLER & PECKHAM,
*Pl'ff's Att'ys.*

(Endorsed:) U. S. circuit court, southern dist. of New York; Union Trust company of New York, as trustee, ag'st The Connecticut Mutual Life Insurance company; defendant's bill of exceptions; Beach & Brown, att'ys for def't, 120 Broadway, N. Y.

152 Due service of a copy of the within bill of exceptions is hereby admitted; also of notice of presentation for Feb'y 19, 1881.

N. Y., Feb'y 11, 1881.

MILLER & PECKHAM,
*Pl'ff's Att'ys.*

(Endorsed:) U. S. circuit court; filed April 11, 1881, *nunc pro tunc* as of January 21st, 1881; Joseph M. Deuel, clerk.

153 Supreme court of the United States, of October term, in the year of our Lord one thousand eight hundred and eighty-one.

*Assignment of Errors.*

The Connecticut Mutual Life Insurance Company, plaintiff in error,
*against*
The Union Trust Company of New York, trustee for the children of William Orton, deceased, defendant in error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the supreme court of the United States, at the capitol, in the city of Washington, comes the said Connecticut Mutual Life Insurance company, by William A. Beach, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the court at the trial erred in overruling the
154 challenge to the favor interposed by defendant to Austin Kirkham, a juror called and sworn in the cause. (Record, p. —.) The sole ground of challenge was that the juror was inter-

ested in the subject of the action, he having subsisting policies of insurance upon his life in companies other than defendant.

Second. The like error is assigned to the ruling of the court below upon like challenge by defendant upon the same ground to each of the jurors, Nicholas R. Conner, Rowland C. Anthony, Theodore R. B. Degroot, and Henry Wilson. (Record, p. —.)

Third. That it was error to reject the question addressed by defendant to Joseph Hasbrouck, a medical witness, called on its behalf. The witness had attended the insured and his family from the fall of 1875 until his death in April, 1878. He testified to his attendance upon the insured in the fall of 1875, on account of a "slight illness." Defendant's counsel asked him "what
155 was the character of that illness?" Plaintiff's counsel objected to the question as incompetent, because calling upon the witness to state facts learned in the course of his professional attendance upon the insured. The court sustained the objection and excluded the question. Defendant excepted. (Record, p. —.)

Fourth. That it was error to exclude the question subsequently put to the same witness in reference to the same illness, as follows: "Were there any external symptoms, which you observed in Mr. Orton at the time of your first visit, which you can state?" By the court.—"Did you observe those external symptoms in your character as a physician and for professional purposes at that time?" Answer.—"Yes, sir." By defendant's counsel.—"Please state what those symptoms were." Plaintiff's counsel objected. The court sustained the objection. Defendant excepted. (Record, p. —.)

Fifth. That the court erred in excluding an offer of proof by the same witness made after he had further testified to attend-
156 ance as a physician upon the insured from October 18th, 1876, until after November 10th, 1876. (Record, p. —,) and to a consultation of physicians during that illness with the witness concerning it. The offer was as follows: "Defendant's counsel offered to show that at the time of this illness in 1876, when this consultation was had, Mr. Orton, by the judgment of these consulting physicians, was suffering from congestion of the liver." Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. —.)

Sixth. That it was error to exclude the question addressed to the same witness in regard to the same illness, as follows: "What was the nature of the disease under which Mr. Orton was then suffering?" Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. —.)

Seventh. That the following question put to the same wit-
157 ness in reference to the same illness was erroneously excluded: "At this time, in 1876, was Mr. Orton suffering under the same disease for which you attended him in 1875?" Plaintiff's counsel objected, and asked witness as follows: "You acquired your knowledge from professional attendance upon him? I

did." The objection was then sustained and exception taken. (Record, p. —.)

Eighth. That it was error to exclude the question addressed to the same witness as follows: "Do you know of Mr. Orton at any time having an attack of the piles?" Plaintiff's counsel objected and asked witness whether he could answer the question aside from professional attendance upon Mr. Orton, outside of the relation of physician and patient. To which witness answered: "I cannot." The objection was sustained and exception taken. (Record, p. —.)

Ninth. That it was error to exclude the question put to William J. Baner, a medical witness sworn for defendant, who had attended the insured as a physician repeatedly from 1872. Question—"During these several attacks of which you have spoken, what
158 was the nature of the disease to which he was subject?" Plaintiff's counsel objected. The court—"I make the same ruling as before. That if your knowledge or information was acquired by you in your character as physician for the purpose of medically treating him, the evidence is inadmissible." Witness—"I know nothing except what I got professionally from them." The objection was sustained. Defendant excepted. (Record, p. —.)

Tenth. That the court erred in excluding the answer given by Dr. Baner to the question calling for a declaration of the insured to the witness to the effect that he had consulted Dr. Bayse in London; and it also erred in excluding an offer of proof by the same witness that "Mr. Orton informed the witness that he had
159 consulted Dr. Bayse in London." Plaintiff's counsel objected. The objection was sustained and defendant excepted. (Record, p. —.)

Eleventh. That the court erred in excluding the question put by defendant's counsel to William T. Helmuth, a medical witness called by it, who had attended the insured and was one of the consulting physicians at the time mentioned by Dr. Baner. Question —"What was the nature of the disease under which Mr. Orton was suffering?" Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. —.)

Twelfth. That it was error to exclude the question put by defendant to Mrs. Orton in reference to the illness of the insured in 1876, as follows: "Did you not understand from your husband the nature of the disease?" Plaintiff's counsel objected. Objection was sustained. Defendant excepted. (Record, p. —.)
160 Thirteenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the first request, as follows:

I. If the jury believes on the evidence that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance, the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. —.) Defendant excepted. (Record, p. —.)

Fourteenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the second request, as follows:

II. If the jury believes on the evidence that the insured ever had had any other illness, local disease, or personal injury than those admitted by him in the application, to wit, colic for one day, fistula, and fever and ague, the policy is void and the defendant is entitled to a verdict.

161 The court refused so to charge, (Record, p. —.) Defendant excepted, (Record, p. —.)

Fifteenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the third request, as follows:

III. If the jury believes on the evidence that the answer to the seventh question in the application to the effect that the insured had never had affection of the liver, or that the answer to the eighth question to the effect that he had not had any other illness, local disease, or permanent injury, except colic for one day in October, 1877, was in fact untrue, it is immaterial whether the answers were made in good faith, or whether the representations were material; the policy is void and the defendant is entitled to a verdict.

The court refused so to charge, (Record, p. —.) Defendant excepted, (Record, p. —.)

Sixteenth. That the court erred in refusing to charge the

162 jury as requested by defendant's counsel in the fourth request, as follows:

IV. That the illness in October, 1876, was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge, (Record, p. —.) Defendant excepted, (Record, p. —.)

Seventeenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the fifth request, as follows:

V. That the illness in 1875 was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application,

163 and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant entitled to a verdict.

The court refused so to charge, (Record, p. —.) Defendant excepted, (Record, p. —.)

Eighteenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the sixth request, as follows:

VI. That the trip to Europe by advice of Dr. Baner in 1874 was

a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge, (Record, p. —.) Defendant excepted, (Record, p. —.)

164 Nineteenth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the seventh request, as follows:

VII. The suffering of several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, if it occurred prior to the making of the application, was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge, (Record, p. —) Defendant excepted, (Record, p. —.)

Twentieth. That the court erred in refusing to charge the jury as requested by defendant's counsel in the eighth request, as follows:

165 VIII. If the court refuses to charge the propositions marked IV, V, VI, and VII, then that it charge, that if the jury believes on the evidence that the trip to Europe by advice of Dr. Baner, the illness in 1875, the illness in 1876, or the suffering of several attacks of malarial fever accompanied by cerebral engorgement, if it occurred prior to the application, or either of them, was a fact relating to the physical condition, personal or family history or habits of the insured, with which the officers of defendant ought to have been made acquainted, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to a verdict.

The court refused so to charge, (Record, p. —.) But the court did charge as follows:

The policy is also void if the applicant has obtained it through any concealment; that is to say, if there has been any concealment of material facts called for by the question the policy is void,

166 and if there were any facts in Mr. Orton's physical condition not stated in any one of these answers with which the company should properly be made acquainted, with a view to determine the character of the risk, then it was his duty to state these facts, inasmuch as he was expressly interrogated thereof in the fifteenth question, that question being this: "Is there any fact relating to your physical condition, &c., which has not been stated in the answers to the foregoing questions, and with which the officers of the company ought to be made acquainted?" Upon this point I charge you that, "if you believe on the evidence that the trip to

Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, of the suffering of several attacks of malarial fever accompanied by cerebral engorgement, (if those attacks occurred, or either of them,) were facts relating to the physical condition and personal history of the assured of importance to the ascertainment of
167 the condition of his health at the time of the application, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to recover."

Now we come to the specific items: first, the trip to Europe. Now, gentlemen, advice to a man or to a patient to go abroad, to Europe, may mean a great deal or it may mean a very little. You have known and I have known that advice to be given to our friends when we knew and the patient knew that it was the signal of his death, and that it was probably the last advice which the physician would ever give. We have known, too, of cases where the advice is given not in a spirit of gravity, or as a thing of necessity, but to a hard-worked man: "Go abroad; take pleasure; take a rest; put your business behind you this summer, and go to the other side; I insist upon it." Now there is the vital thing in this part of the
168 case. If Mr. Orton was broken down by hard work and the victim of insomnia, a victim of shattered nerves and so on, and was compelled to abandon business and seek rest and recreation, then it is a serious question whether he should have asked a policy of insurance without telling the company of his physical condition; but, gentlemen, if this advice to go abroad was a suggestion not intended to be a grave suggestion, or a serious suggestion, and one which it was vital to the man or important to the man to obey, then, gentlemen, it is in my opinion not one of those circumstances which was of importance to communicate.

I now come to another point and part of the case, of the suffering of several attacks of malarial fever accompanied by cerebral engorgement. The two great points in the case on the part of the defendant are the illness in 1876 and the facts, if they be facts,
169 mentioned in the proofs of loss by the physician. In reply to the inquiry, "state the remote cause of death," &c., Dr. Baner makes answer: "The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever accompanied in each instance by considerable cerebral engorgement." "Q.—State the immediate cause of death?" "A.—Cerebral apoplexy." "Q.—Had the deceased any other disease, acute or chronic, or had he ever had any injury or infirmity?" "A.—I think not." "Q.—Was there anything in his habits or mode of life that predisposed him to disease?" "A.—Nothing but a tendency to overwork."

Now, gentlemen, if it was a fact that Mr. Orton had had, prior to the application, several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, then that would be, in my judgment, a fact for you to consider. I do not say

it would be an important fact, for that is for you to deter-
170 mine. My charge was that if the jury believe on the evidence that these facts, if they exist, were facts relating to the physical condition of Mr. Orton of importance to an ascertainment of the condition of his health at the time of his application, then it was a fact that he ought to have communicated to the company, and if he did not, the policy was void.

The first question is this: Did these attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, exist? I pass by the question whether, if they existed, they were known to Mr. Orton, because I do not consider it material to put that question to you. Of course, if a man has several attacks of malarial fever, he being an intelligent man and a man acquainted with medicine, he knew whether he had them or not. Now, Dr. Baner has given his statement, and has given it on his med-
171 ical authority. The plaintiff says that it is a mere statement of Dr. Baner; that it was a statement, in the first place, in regard to which Dr. Baner may have been mistaken. If cross-examination had been made, perhaps it would have softened that statement very materially. Upon a statement made out of court, made simply to inform the company that the man was dead, and what, in his opinion, was the predisposing or remote cause of death, it is not competent for you to find as an affirmative fact that those attacks existed. The first question is whether they existed, and in the next place, if they existed, whether their existence was not of importance to an ascertainment of his condition, which ought to have been communicated. If it was of importance to the company to know that those attacks of malarial fever existed, then it was Mr. Orton's duty to have communicated it.

172 And the said Connecticut Mutual Life Insurance company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

W. A. BEACH,
*Attorney for Plaintiff in Error.*

(Endorsed:) Supreme court of the United States; The Connecticut Mutual Life Insurance company, plaintiff in error, against The Union Trust company of New York, trustee, etc., defendant in error; assignment of errors; W. A. Beach, attorney for
173 plaintiff in error, 120 Broadway, New York; United States circuit court; filed June 22, 1881; Joseph M. Deuel, clerk.

*Bond for Damages and Costs.*

174 Circuit court of the United States of America for the southern district of New York, in the second district.

Union Trust company of New York, trustee for the children of William Orton, deceased, plaintiff,
*vs.*
Connecticut Mutual Life Insurance company, defendant.

Know all men by these presents that we, Philip S. Miller, of No. 9 East Seventy-eighth street, in the city of New York, and E. P. Fabbri, of No. 29 West Nineteenth street, in said city, are held and firmly bound unto the above-named Union Trust company of New York, trustee for the children of William Orton, deceased, in the sum of fifteen thousand dollars, to be paid to the said Union Trust company of New York, trustee for the children of Wm. Orton, deceased, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-named Connecticut Mutual Life Insurance company has prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such, that if the above-named Connecticut Mutual Life Insurance company shall prosecute said writ of error to effect and answer all damages and costs if said Connecticut Mutual Life Insurance company fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PHILIP S. MILLER. [L. S.]
E. P. FABBRI. [L. S.]

Sealed and delivered and taken and acknowledged this 20th day of April, 1881, before me.

[L. S.] GEORGE W. MARK,
*Notary Public* (14) *New York county.*

UNITED STATES OF AMERICA, } *ss.*
*Southern District of New York,* }

Philip S. Miller, being duly sworn, doth depose and say that he is a resident and freeholder within the southern district of New York; that he is worth the sum of fifteen thousand dollars over and above all his just debts and liabilities, and exclusive of property exempt by law from levy and sale under an execution.

PHILIP S. MILLER.

Sworn to this 20th day of April, A. D. 1881, before me.
175 [L. S.] GEORGE W. MARK,
*Notary Public* (14) *New York county.*

UNITED STATES OF AMERICA, } *ss.*
*Southern District of New York,* }

E. P. Fabbri, being duly sworn, doth depose and say that he is a resident and householder within the southern district of New York; that he is worth the sum of fifteen thousand dollars over and above all his just debts and liabilities, and exclusive of property exempt by law from levy and sale under an execution.

E. P. FABBRI.

Sworn to this 20th day of April, A. D. 1881, before me.
[L. S.] GEORGE W. MARK,
*Notary Public* (14) *New York county.*

The foregoing bond is approved April 21st, 1881.
SAMUEL BLATCHFORD,
*Circuit Judge.*

UNITED STATES OF AMERICA, } *ss.*
*Southern District of New York,* }

On this twentieth day of April, A. D. 1881, before me personally came Philip S. Miller and E. P. Fabbri, to me severally known, and known to me to be the individuals described in and who executed the within bond, and severally acknowledged to me that they executed the same.

[L. S.] GEORGE W. MARK,
*Notary Public* (14) *New York county.*

(Endorsed:) United States circuit court; Union Trust company of New York, trustee for the children of William Orton, deceased, plaintiff, *vs.* Connecticut Mutual Life Insurance company, defendant; bond for damages and costs; Beach & Brown, proctors for defendant, 120 Broadway, N. Y.; United States circuit court; filed April 21, 1881; Joseph M. Deuel, clerk.

176 United States of America, *ss.*

To Union Trust company of New York, trustee for the children of William Orton, deceased, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Connecticut Mutual Life Insurance company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should

not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated April 21st, 1881.

SAMUEL BLATCHFORD,
*Circuit Judge.*

177 Due and timely service of the within citation is hereby admitted, and the defendant in error hereby waives all irregularities therein, if any, and stipulates to enter its appearance in the United States supreme court when the transcript of the record shall have been filed.

Dated New York, April 22, 1881.

UNION TRUST CO. OF NEW YORK,
*Trustee, etc.,*
By MILLER & PECKHAM, *Attorneys.*

(Endorsed:) United States supreme court; Connecticut Mutual Life Insurance company, plaintiff in error, against Union Trust company of New York, trustee for the children of William Orton, deceased, defendant in error; citation; U. S. circuit court; filed April 23, 1881; Joseph M. Deuel, clerk.

(Endorsed on cover:) S. New York; C. C. U. S.; No. 304; The Connecticut Mutual Life Insurance company, plaintiff in error, *vs.* The Union Trust company of New York, trustee for the children of William Orton, deceased; filed 24 September, 1881; 177 pages.

112-250

# SUPREME COURT OF THE UNITED STATES.

No. 304.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

*Plaintiff in Error,*

*against*

THE UNION TRUST COMPANY OF NEW YORK, TRUSTEE FOR THE CHILDREN OF WILLIAM ORTON, DECEASED,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

W. A. BEACH,

*Counsel for Plaintiff in Error.*

# Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE CO.,
*Plaintiff in Error.*

—*v.*—

THE UNION TRUST COMPANY OF NEW YORK, Trustee, &c.

This Case comes before the Court, upon a Writ of Error to the Circuit Court of the Southern District of New York.

The Action was brought in the State Court in October, 1878, upon a Policy of Insurance, issued by Defendant, Plaintiff in Error, in February, 1878, upon the life of *William Orton*, to the Plaintiff, Defendant in Error, in Trust. (Record, fol. 8). It was removed into the Circuit Court of the United States, for the Southern District of New York, in November, 1878. (Record, fol. 5, &c).

The Answer was filed in April, 1879. (Record, fol. 34). It annexed the Application and Policy as Exhibits. It admitted the issuing of the Policy in February, 1878, and the death of the Insured in April, 1878, and service of proofs of loss and demand of payment. It properly set up breaches of several of the warranties contained in the application.

The Cause came on for Trial before the Honorable Nathaniel Shipman and a Jury, at New York, on the 20th January, 1881. On the 21st January, 1881, the Jury rendered a Verdict for Plaintiff for $5,767.91. (Record, fol. 149). Judgment was entered April 18th, 1881, for $5,904.52. (Record, fol. 50). A Bill of Exceptions was regularly settled and signed, appearing from fol. 53 to fol. 153, of the Record. The assignment of Errors follows the Bill, at fol. 153.

Before the Court instructed the Jury, Defendant submitted requests to charge, which were disposed of as appears by the Record except that the addition to the refusal to each of the words "except as charged," was evidently made by the Judge on signing the Bill of Exceptions. It is, however, of no consequence.

*Assignment of Errors relied upon.*

*First.* That it was error to reject the question addressed by defendant to Joseph Hasbrouck, a medical witness, called on its behalf. The witness had attended the insured and his family from the fall of 1875 until his death in April, 1878. He testified to his attendance upon the insured in the fall of 1875, on account of a "slight illness." Defendant's counsel asked him "what was the character of that illness?" Plaintiff's counsel objected to the question as incompetent, because calling upon the witness to state facts learned in the course of his professional attendance upon the insured. The court sustained the objection and excluded the question. Defendant excepted. (Record, p. 37.)

*Second.* That it was error to exclude the question subsequently put to the same witness in reference to the same illness as follows: "Were there any external symptoms, which you observed in Mr. Orton at the time of your first visit, which you can state?" By the court.—"Did you observe those external symptoms in your character as a physician and for professional purposes at that time?" Answer.—"Yes, sir." By defendant's counsel.—"Please state what those symptoms were?" Plaintiff's counsel objected. The court sustained the objection. Defendant excepted. (Record, p. 38.)

*Third.* That the court erred in excluding an offer of proof by the same witness made after he had further testified to attendance as a physician upon the insured from October 18th, 1876, until after November 10th, 1876, (Record, p. 39,) and to a consultation of physicians during that illness with the witness concerning it. The offer was as follows: "Defendant's counsel offered to show that at the time of this illness in 1876, when this consultation was had, Mr. Orton, by the judgment of these consulting physicians, was suffering from congestion of the liver." Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. 39.)

*Fourth.* That it was error to exclude the question addressed to the same witness in regard to the same illness, as follows: "What was the nature of the disease under which Mr. Orton was then suffering?" Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. 40.)

*Fifth.* That the following question put to the same witness in reference to the same illness was erroneously excluded. "At this time, in 1876, was Mr. Orton suffering under the same disease for which you attended him in 1875?" Plaintiff's counsel objected, and asked witness as follows: "You acquired your knowledge from professional attendance upon him? I did." The objection was then sustained and exception taken. (Record, p. 40.)

*Sixth.* That it was error to exclude the question addressed to

the same witness as follows: "Do you know of Mr. Orton at any time having an attack of the piles?" Plaintiff's counsel objected and asked witness whether he could answer the question aside from professional attendance upon Mr. Orton, outside of the relation of physician and patient. To which witness answered: "I cannot." The objection was sustained and exception taken. (Record, p. 40.)

*Seventh.* That it was error to exclude the question put to William J. Baner, a medical witness sworn for defendant who had attended the insured as a physician repeatedly from 1872. Question—"During these several attacks of which you have spoken, what was the nature of the disease to which he was subject?' Plaintiff's counsel objected. The court—"I make the same ruling as before. That if your knowledge or information was acquired by you in your character as physician for the purpose of medically treating him, the evidence is inadmissible." Witness—"I know nothing except what I got professionally from them." The objection was sustained. Defendant excepted. (Record, p. 45.)

*Eighth.* That the court erred in excluding the answer given by Dr. Baner to the question calling for a declaration of the insured to the witness to the effect that he had consulted Dr. Bayse in London; and it also erred in excluding an offer of proof by the same witness that "Mr. Orton informed the witness that he had consulted Dr. Bayse in Landon." Plaintiff's counsel objected. The objection was sustained and defendant excepted. (Record, p. 44.)

*Ninth.* That the court erred in excluding the question put by defendant's counsel to William T. Helmuth, a medical witness called by it, who had attended the insured and was one of the consulting physicians at the time mentioned by Dr. Baner. Question—"What was the nature of the disease under which Mr. Orton was suffering?" Plaintiff's counsel objected. The objection was sustained. Defendant excepted. (Record, p. 46.)

*Tenth.* That it was error to exclude the question put by defendant to Mrs. Orton in reference to the illness of the insured in 1876, as follows: "Did you not understand from your husband the nature of the disease?" Plaintiff's counsel objected. Objection was sustained. Defendant excepted. (Record, p. 49.)

*Eleventh.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the first request as follows:

I. If the jury believes on the evidence that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance, the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. 56.) Defendant excepted. (Record, p. 64.)

*Twelfth.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the second request, as follows:

II. If the jury believes on the evidence that the insured ever had had any other illness, local disease, or personal injury than those admitted by him in the application, to wit, colic for one day, fistula, and fever and ague, the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. 57.) Defendant excepted. (Record, p. 64.)

*Thirteenth.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the fourth request, as follows:

IV. That the illness in October, 1876, was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. 57.) Defendant excepted. (Record, p. 64.)

*Fourteenth.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the fifth request, as follows:

V. That the illness in 1875 was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant entitled to a verdict.

The court refused so to charge. (Record, p. 57.) Defendant excepted. (Record, p. 64.)

*Fifteenth.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the sixth request, as follows:

VI. That the trip to Europe by advice of Dr. Baner in 1874 was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. 57.) Defendant excepted. (Record, p. 64.)

*Sixteenth.* That the court erred in refusing to charge the jury as requested by defendant's counsel in the seventh request, as follows:

VII. The suffering of several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement, if it occurred prior to the making of the application, was a fact relating to the physical condition and personal history of the insured which was not stated in any of the answers to the questions in the application, and with which the officers of the company should have been made acquainted, and for failure to disclose such fact the policy is void and the defendant is entitled to a verdict.

The court refused so to charge. (Record, p. 57.) Defendant excepted. (Record, p. 64.)

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# POINTS.

At the time of the Trial, the Rule of Evidence in New York, as to the testimony of Physicians, concerning the condition of their Patients, was not very satisfactorily settled. It had been unstable, and fluctuating,—in so far, that it was thought justifiable to submit the question to this Court. More recent authority seems to confirm the ruling of the Judge at Circuit, upon that subject. As the Case is before the Court, the Point may be briefly presented.

Upon the Trial, the Court, in various forms, excluded questions addressed to Physicians, who had attended the insured, calling for a description of his disease. The questions were pertinent, being directed to prove breaches of warranty by the Insured, and were rejected, solely, upon the ground, that, under the objection of Plaintiff, and the Statute of New York, the Witnesses were prohibited from revealing any information gained, while in attendance upon the Insured. (fols. 84, 86, 90, 91, 102, 104). The assignment of errors contains the substance of the evidence rejected.

I.—It is supposed to be the doctrine of this Court, that the Laws of the several States prescribing *Rules of Evidence*, and declaring the *competency* of witnesses, are followed by the Courts of the United States within their limits, when not in conflict with the Constitution, Treaties, or Statutes of the Union:—If not, the ruling at the Circuit was clearly erroneous, the testimony excluded being admissible at Common Law.

*Potter* v. *National Bank*, 12 Otto, 163.
*Dibbler* v. *Furniss*, 4 Blatch., 262.
*Fowler* v. *Hecker*, id., 425.
*United S.* v. *Train*, 12 Fed. Rep., 852.
*Spears Federal Judiciary*, p. 642.

II.—The Judge at the Circuit acted upon §834 of the Code of Civil Procedure of New York, as follows: "*A person duly authorized to practice Physic or Surgery, shall not be allowed to disclose any information which he acquired in attending a Patient, in a Professional capacity, and which was necessary to enable him to act in that capacity.*"

The following are the principal Decisions of the Court of Appeals of New York, rendering and applying this Section of the Code.

*Sloan* v. *N. Y. C. R. R. Co.*, 45 N. Y., 125.
*Edington* v. *Mutual L. I. Co.*, 67 N. Y., 185.
The same v. *Aetna L. I. Co.*, 77 id., 564.
*Pierson* v. *The People*, 79 id., 424.
Reviewing S. C., 18 Hun., 237-245, and commending Opinion of *Talcott, J.*
*Grattan* v. *Metropolitan L. I. Co.*, 80 N. Y., 281.
The same v. The same, 92 id., 274.

The last Case cited was Decided at the April Term, 1883. The next preceding was not reported until 1881—the Trial having been in January, 1881. *Edington* v. *The Aetna L. I. Co.*, (77 N. Y., 564), and *Pierson* v. *The People*, (79 N. Y., 424), were thought to justify the belief, that the Statute under consideration would thereafter receive a more liberal application, than had hitherto prevailed. Certainly, in its rigorous construction, it is not favorable to the development of truth. It suppresses Evidence of the most innocent character,—not in the least tending to disturb the Trust, which should exist between Physician and Patient. It does not afflict the living, nor reflect upon the Dead, that a Physician should testify, that his Patient died from a fever, or an affection of the liver. As now understood, the rule of Evidence in New York, shuts out, in Life Insurance Cases, the only appropriate, and Satisfactory source of Evidence, to show the Cause of Death.—No good reason can be assigned for this suppression of Truth.—The Point is not felt to be open to discussion, either as to the doctrine of New York, or of this Court in adopting it, *as a rule of Evidence*. If it be possible for the Court, under its Decisions, to consider Secs. 721-858 and 914 of the Revised Statutes of the U. S., in so far as Evidence is concerned, as relating rather to the Competency of Witnesses, than the nature of proof, the Plaintiff in Error, respectfully urges that proposition.

III.—The Court erred, in rejecting the Question put to *Mrs. Orton*, in reference to the illness of the insured in 1876, as specified in the 10th assignment of Error—as follows—*Did you not understand from your Husband the nature of the disease?* (Record, fol. 110.)

The Evidence was competent as preliminary to a further question calling for his declaration. That would have been competent, as part of the *res gestae* of his illness. During it, *Mrs.*

*Orton* was in attendance upon her Husband. The question called for information derived from him as to the nature of the disease, "*under which he was suffering*, at the time." It was a declaration of the Insured, made before the Insurance was effected, characterising his illness, and at least competent to show, his knowledge of the existence of the specific disease. It was important to show the knowledge of the deceased, under the qualified answer given to one of the questions of the application. (Record, p. 21, Question 15.)

*Swift* v. *Massachusetts Mutual Life Ins. Co.*, 63 N. Y., 186.
*Edington* v. *Mutual L. I. Co*, 67 id., 185.
*Dilleber* v. *Home L. I. Co.*, 69 id., 256.

IV.—The Court erred, in refusing to Charge as asked in the first request, (fol. 128) and specified in the 11th Assignment. His Charge, as given, failed to present the proposition specifically to the Jury. The Warranty was, that the insured had never had an *affection of the liver*. (Record, p. 20.) The application classifies "*affection of the liver*" as a disease. The question in the application was "*Have you ever had any of the following diseases?*" One was designated "*Affection of liver?*" Answer, *No.* (Record, p. 20.) It was error, therefore, for the Court to Charge, emphatically, as he did, that the "affection of the liver," if shown, must be "an illness which amounted to an attack of such marked and serious character, and symptoms that the disease was well defined." (p. 59.) The Court, in his Charge, (fol. 137) very fairly presents the facts shown, characterising the disease. They abundantly prove, that the Insured had "an affection of the liver," which prostrated him for a month." Had the request been charged, the Jury could not have disregarded the uncontradicted proof, that the illness of 1876 was produced by that disease. (Record, p. 48, fol. 109. Evidence of *Mrs. Orton.*)

V.—It was error to refuse the Charge contained in the Second request, as follows:—"*if the Jury believe on the Evidence, that the insured ever had any other illness—local disease, or personal injury, than those admitted by him in the application, to wit, colic for one day, fistula, and fever and ague, the Policy is void, and the Defendant is entitled to a Verdict.* (Record, fol. 128—Assignment of Error, No. 12.) The Charge given, did not cure the error. (fol. 140. Application, p. 27, No. 8.

Instead of submitting the instruction as requested, the Court passed to the Jury the question, whether or not the Defendant had "*given sufficient affirmative evidence*" to satisfy them "*that this man had what may be called an illness*," in 1876. (fol. 141.)

Instructed by the description of this illness, given by the Court, previously in his Charge, the manner of dealing with

this request is amusing. A man of active business habits, with pressing engagements which force him habitually to overwork, impairing his health, is forced to surrender labor—is confined to his house for a month, in charge of Physicians, with a complaint called by his Wife congestion of the liver, of such serious character as to require a council of medical attendants, who warrants that he never had any other illness—local disease, or personal injury, than Colic for one day. The Court, asked to instruct a Jury, that if an insured, under such circumstances, ever had any illness besides Colic his Policy is void, refuses, and diverts their attention with the issue, whether or not any illness was proven.

It is respectfully urged, that Defendant was entitled to the Specific instruction requested, however the Court may have thought proper to encumber, or modify it. True the Court had charged generally the Law, (fol. 133) but a pointed and direct application of it to this feature of the application, was due to the Case and to the Defendant. No one can fail to see how erroneous the finding of the Jury was, or to attribute it to its proper influence.

VI.—The Application contains this Question and Answer, "*Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the Officers of the Company ought to be made acquainted.*" "*No, nothing to my knowledge.*" (Record, p. 21, question 15).

Defendant requested the Court to Charge the Jury as specified in the 13th, 14th, 15th and 16th assignments of error. (Requests to Charge, fol. 129, &c).

The attention of the Court is especially asked to the Seventh request to charge, (fol. 130), and the Sixteenth assignment of error, (fol. 164), in connection with the Charge of the Court. (fol. 145). It is submitted, that the Court erred in refusing to Charge as requested. The proofs of loss contained the Statement of the attending Physician, that the remote cause of the Insured's death, was "*severe attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement.*"

That Statement, furnished Defendant by the Plaintiff, is to be taken as true, against it, especially if there was no qualifying proof, or evidence of mistake. It cannot be speculated out of existence. (*McMaster* v. *President*, &c., 55 N. Y., 222. *Irvine* v. *Excelsior Co.*, 1 Bosw. 507.) The Request to Charge assumed it to be true, and if it were, Defendant was entitled to the desired instruction. The Court absolutely refused it, and instead, instructed them as follows: "*The first question is this:—Did these attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement exist.* * * * *The Plaintiff says that is a mere statement of Dr. Baner;—that it was a statement in the first place, in regard to which Dr. Baner may*

*have been mistaken. If cross-examination had been made, perhaps it would have softened the statement very materially. Upon a statement made out of Court, made simply to inform the Company that the man was dead, and what in his opinion, was the predisposing or remote cause of death, it is not competent for you to find, as an affirmative fact, that those attacks existed.*"

To this Charge there was an Exception. (Record, fol. 149).

That the fact, if it were so, that the insured, prior to the application, suffered such attacks, so related to his physical condition and personal history, as to require communication to the Company, could not be questioned. It was self-evident, and not a matter about which a Jury might speculate.

It is respectfully submitted that the Court erred in his refusal to Charge as requested. The like considerations apply to the matter specified in the 13th, 14th and 15th Assignments of Error.

W. A. BEACH,

*Counsel for Plaintiff in Error.*

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

112-250

# United States Supreme Court.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

AGAINST

UNION TRUST COMPANY OF NEW YORK,
Trustee for the Children of William Orton, Deceased,
Defendant in Error.

Brief for Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## STATEMENT.

The defendant in error, plaintiff below, sued on a policy of insurance made by plaintiff in error, defendant below. There was a verdict and judgment for plaintiff below. The defendant below took certain exceptions to the rejection of evidence and to the refusal of the Court to charge as requested. A bill of exceptions was signed and presents the questions here sought to be reviewed.

## POINTS.

**First.** The plaintiff in error interposed challenges to the favor to five several jurymen.

The evidence on the challenges showed that these jurymen had policies on their lives in other companies.

The Court overruled the challenges (Record, pp. 24–25). In this we submit that there was no error.

1. The challenge was for *favor*. The challenge and its traverse raised a question of fact on which the decision of the Court stands like the verdict of a jury. It cannot be reviewed here, as no question of law was involved.

2. If it could be reviewed there is no error. That a juror had insured his life in another company is no more ground to exclude him than would be the fact that he was a merchant if called in an action of assumpsit for goods sold.

**Second.** A series of exceptions were taken to the exclusion of testimony by attending physicians as to the character of certain attacks of illness of the assured, Mr. Orton.

The view taken by the Court is stated on page 37 of the record.

It accords with the well settled rule in New York, and it being a question of the construction of a State statute the Federal Courts will follow the State Courts.

Bacon vs. Frisbie, 80 N. Y., p. 394.
Grattan vs. Metr. Ins. Co., 92d N. Y., 274.

The same rule is held in Missouri on a statute which leaves out the words "from any patient" in referring to the source of information.

Gartsides vs. Conn. Ins. Co., 16 Cent. Law J., 253.

**Third.** There was no error in the ruling sustaining the objection to the answer of Dr. Baner as to whether Mr. Orton had told Dr. Baner that he, Mr. Orton, while in London, had consulted Dr. Bayse (Record, p. 44, fol. 101).

1. Though the *objection* was sustained, the answer was not struck out or withdrawn from the jury.

2. The plaintiff in error aftewards proved by Mrs. Orton all about the consultation with Dr. Bayse (Record, p. 53).

3. The evidence was not admissible. The declarations of an assured life, not part of the *res gestæ* in obtaining the policy, are not competent.

Dilleber vs. Ins. Co., 69 N. Y., 256.
Cushman vs. Ins. Co., 70 N. Y., 72–81.

**Fourth**. The plaintiff in error made several requests to charge, which will be found on pp. 56 to 57 of the record.

The first, second and third requests the Court refused, except as it had already charged.

These three requests relate to the warranty, and on comparing them with the charge as given, will be found to raise questions conclusively settled in New York.

The charge of the Court is in exact accord with the requests (Record, pp. 58, 59, 60, 61), except that the Court gave the jury some rules as to the construction of the policy, and as to what was meant or what the jury might say was meant by its terms. The Court then left it to the jury to say whether the facts agreed or conflicted with the warranty.

For so doing there is ample precedent.

Cushman vs. Ins. Co., 70 N. Y., 72, and the many cases cited.
Edington vs. Ins. Co., 67 N. Y., 185, 197.
Flynn vs. Equitable Ins. Co., 78 N. Y., 568.

The third request is open to the further objection that it predicates a breach of warranty on an omission to state certain things which cannot be done. "Warranty must be based upon the affirmation of something not true."

Dilleber vs. Ins. Co., 67 N. Y., 257.

The 4th, 5th, 6th and 7th requests refer to the defense of fraudulent concealment. They virtually ask the Court to decide or assume the question of fact in favor of defendant, and thereupon to direct a verdict. The Court most properly declined to decide the question of fact, but left it to the jury.

Ins. Co. vs. Baker, 94 U. S., 610.

The 7th request was substantially charged with the addition

of the rules of law applicable and essential for the jury to know in order to intelligently pass on the case.

See charge, pp. 62–63.

See cases before cited, and also

Rawls vs. Ins. Co., 27 N. Y., 282.
Mallory vs. Ins. Co., 47 N. Y., 52.

The Court erred, if at all, on the side of plaintiff in error (see pp. 62 and 64), in devolving on Mr. Orton the duty of stating facts, though he may honestly not have deemed them of importance.

It is of course to be borne in mind that this case comes here on a bill of exceptions only, and that it does not purport to contain all the evidence.

The judgment of the Court below should be affirmed with costs.

WHEELER H. PECKHAM,
Of Counsel for Deft. in Error.